



# LAW IN EVERY DAY LIFE



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# LAW IN EVERY DAY LIFE

by

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DELHI

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## PREFACE

"Law in Everyday Life" has been written primarily for the layman. The object in view is to fill the gap which exists between expert legal knowledge of a lawyer and ignorance of an average citizen of even the elementary principles of law governing daily life.

Law is a body or rules of human conduct either prescribed by long established usages and customs or laid down by a paramount political power. Interference on the part of the "State" in the affairs of the community to a greater or lesser degree is an accepted principle of society. Community life would indeed be a sad tangle if there were no laws or rules which had to be observed by all. The form of this interference is different in different countries, the most common being legislative enactment through the representatives of the people. This comprises what is collectively called "Statute Law". In our own country also we frequently hear of Acts passed by the Central and the Provincial Legislative Assemblies. The force of this powerful machinery is, however, seldom recognised until we find ourselves involved in an act which according to a rule laid down by a certain enactment of the Legislature we ought or ought not to have done. We have often to suffer for our ignorance, and our repentance, howsoever sincere, cannot undo the mischief already done.

It is curious that a study of such an important subject affecting each and every member of the society does not find a place in our normal school or college curriculum. To become good citizens it is essential that we should know our rights and liabilities and act according to the rules laid down for us. Indeed, the world would be much happier if the maximum number

of people living in it be prepared to honour their obligations and respect others' rights. For all this knowledge of law is necessary.

In this book I have attempted to state in a simple language the law relating to a number of important subjects we come across in our daily life. The list is by no means exhaustive, but the selection of the subjects has been made very carefully with a view to meeting the requirements of an average citizen. Throughout the book illustrations from topics of every day occurrence have been added to explain the principles of law which otherwise would appear to be dull and knotty. I have tried to be as precise as possible and to avoid generalisations of principles. A book of this nature, however, can give no more than a sketchy outline of the law, and can in no sense replace the standard treatises on different branches of the law dealt with in it. In a complicated case one must seek the advice of a competent lawyer. For day to day purposes this book will however give enough. I have checked and rechecked the correctness of the principles of law stated in this book, and I am confident one will not come across any glaring mistake in it. The principles stated herein must, however, be applied to the facts of a particular case with caution. I may be permitted to say that neither the publishers nor the author will accept any responsibility if any reader of this book takes a wrong decision based on some misapprehension or wrongful application of any principle of law stated herein. I can no doubt assure the reader that this book will give him a lot of interesting and useful information which if intelligently followed and properly utilised, will prove valuable to him in his daily life. For facility of reference I have added an exhaustive index and a table of contents giving the various heads under which the subjects have been dealt with in this book.

In the preparation of this book I have derived considerable help from various standard works on English as well as Indian Law, too numerous to be

acknowledged individually To the illustrious authors of these works *in cognito*, I offer my thanks and tender unqualified apology for the omission

The book has been written with the idea of serving the maximum number of people This is possible only if the book is made available to the public at a reasonable price. I acknowledge gratefully the co-operation of the management of Rajkamal Publications Limited, Delhi, for the fine printing and nice get up of the book and for offering it to the public at a very reasonable price inspite of superior paper and bold type used for it My thanks are also due to the management of Rajhans Press, Dehli, for the interest they have taken in the printing of this book.

I shall feel grateful if I am favoured with suggestions for the improvement of this book

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# LAW IN EVERY DAY LIFE

## CHAPTER I.

### CONTRACTS.

#### Obligations.

An obligation in the language of jurisprudence, is the legal tie which connects two definite persons A and B of whom A has a *right* that B shall do or refrain from doing something to, for, or on behalf of, A, while B is under a corresponding *duty* to do or refrain from doing that same thing to, for, or on behalf of A. A's end of the tie we call a right, B's end a duty, 'obligation' covers both the right and the duty, considered together.

The methods by which this legal bond comes into existence and connects the two parties are mainly two (i) The first is the act of the parties themselves in agreeing together to create such an obligation between them, which in this case is called a *contract* (ii) The second is the act of the law itself, either (a) by imposing upon two parties, standing in certain mutual relationships arising independently of agreement, an obligation analogous to a contract, which is therefore said to arise from quasi-contract *e. g.* in certain cases an obligation to restore money paid in ignorance of fact, or (b) in fixing the general principles of civil (as opposed to criminal) liability for legal injury inflicted by one person upon another, apart from breach of contract and from quasi-contract. For instance, when A assaults or libels or otherwise causes a legal injury to B, immediately and automatically an obligation is fastened on A by which he comes under a duty to make compensation to B for the legal injury done to him; and B has a right of action to recover

this compensation. In this case it is the legal injury, or Tort as it is called, which gives rise to the obligation.

By far the greater part of the actions coming in our daily life and tried before our courts of justice relate directly or indirectly to matters arising out of contracts. The view of law is that, when a person of mature judgment has voluntarily undertaken an obligation, he should be constrained to fulfil that obligation or to pay compensation to the party aggrieved by its non-fulfilment. We shall therefore proceed to study briefly the principles of law relating to this subject.

### **Contract defined.**

A contract is an *agreement* enforceable by law. The definition thus resolves itself into two distinct parts. First of all there must be an agreement. Secondly, such an agreement must be enforceable by law.

*Agreement*—A says to B, "Will you buy my horse for Rs 500?" There is a *proposal* or *offer* (as it is termed in English law) from A to B. B replies "yes". The proposal is *accepted* by B. It becomes a "*promise*" or an "*agreement*". A is the "promisor" and B the "promisee". The promise or agreement binds both A and B. The "consideration" of the promise is buying the horse for Rs. 500/-

An agreement not enforceable by law is said to be *void*. An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others is a *voidable* contract.

An agreement may be express or implied. If A mentions a figure at an auction bid he is deemed in law to have made an offer. It is an *express* offer. If the auctioneer drops his hammer, his conduct *implies* that he accepts A's offer. So also if a company runs a bus which stops to take up and set down passengers it implies that the company is making an offer to carry

any member of the public to any place on the route at the stated fare. If any person gets on the bus he is presumed by law to have accepted the offer to pay the fare which is due for the distance he wants to travel.

*Making of an offer*—A person is said to make an offer when he signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such an act or abstinence. An offer becomes *complete* only when it is communicated to the offeree. The communication is deemed to be made by any act or omission of the party proposing by which he intends to communicate such proposal or which has the effect of communicating it.

The communication of an offer is complete when it comes to the knowledge of the person to whom it is made. A proposes by letter, to sell a house to B, at a certain price. The communication of the proposal is complete when B receives the letter.

*Acceptance of an offer*—There is no agreement unless the offer is accepted by the person to whom it is communicated. An offer is said to be accepted when the person to whom it is made signifies his assent thereto. It must also be communicated to the person who makes it like the making of an offer.

The communicating of an acceptance is complete—

(a) as against the offeror, when it is put in a course of transmission to him, so as to be out of the power of the acceptor,

(b) as against the acceptor, when it comes to the knowledge of the offeror.

Thus, where B accepts A's proposal by a letter sent by post the communication of the acceptance is complete (i) as against A when the letter is posted and (ii) as against B, when the letter is received by A.

*Revocation of an offer or acceptance*—A proposal may be revoked at any time before the communication of the acceptance is complete as against the proposer, but not afterwards. Where A proposes, by a letter sent by post, to sell his house to B, and B accepts the proposal by a letter sent by post, A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

Similarly, an acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards. Thus, in the above case, B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A but not afterwards.

The above is based on the principle that communication of a revocation is complete, (1) as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it, and (ii) as against the person to whom it is made, when it comes to his knowledge. If A revokes his proposal by telegram, the revocation is complete as against A, when the telegram is despatched, and as against B, when B receives it. If B revokes his acceptance by telegram, B's revocation is complete as against B, when the telegram is despatched, and as against A when it reaches him.

A proposal is revoked—

(1) by the communication of notice of revocation by the proposer to the other party,

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed by the lapse of a reasonable time, without communication of the acceptance,

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance, or

(4) by the death or insanity of the proposer,

if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance

*Acceptance must be absolute*—In order to convert a proposal into a promise, the acceptance must be absolute and unqualified and expressed in some usual and reasonable manner, or in a manner prescribed in the proposal. Thus, a proposal for insurance may be accepted in all its terms, but with the statement that there shall be no assurance till the first premium is paid. Here there is no contract, but only a counter-offer, and the intending insurer may refuse a tender of the premium if there has meanwhile been any material change in the facts constituting the risk to be insured against.

*Lapse of an offer*—Generally when an offer is made, a time is indicated within which the same has to be accepted. When offers are made for a limited time, it is necessary that offer must be accepted within the specified time, otherwise there will be no valid acceptance. A says to B, "I give you the refusal of my house at Rs 10,000 for 14 days." This means that A offers the property to B at that price and that the offer is one which is only to continue open for 14 days.

If no time is fixed the offer may lapse after a reasonable time. What is reasonable time depends in each case on the nature of the business.

An offer remains in force until it is accepted or revoked or rejected or lapses by process of time.

### **What agreements are contracts.**

As already noted, an agreement to be a contract must be enforceable by law. The three requisites to make an agreement a contract are—

(A) it is made by the free consent of parties having the legal capacity to enter into agreement,

(B) the agreement is made for a lawful purpose and is not in its effect opposed to public policy; and



(C) is made for lawful consideration.

If by any law in force in British India any contract is required to be made in writing or in the presence of witnesses or requires registration, it will be valid only when the necessary formalities have been complied with.

**(A) Only persons having legal capacity to enter into agreement can contract.**

Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. Thus, contracts entered into by minors and persons of unsound mind are *void*.

**Age of majority**

Every person domiciled in British India is deemed to have attained his majority when he has completed his age of eighteen years, and not before. In the case of a minor of whose person or property or both a guardian has been appointed by a court, or of whose property the superintendence is assumed by a Court of Wards, before the minor has attained the age of eighteen years, the age of majority is twenty-one years. These rules, however, do not affect the capacity of any person to act in matters of marriage, dower, divorce and adoption to which personal law applies, i.e. Hindu Law in the case of Hindus and Mohammadan Law in the case of Mohammadans.

There is difference of opinion among the Hindu writers as to the age of majority under Hindu Law. According to some writers, minority terminates at the completion of the fifteenth year, according to others, at the completion of the sixteenth year. The former view is held in Bengal, the latter view, in other parts of British India. Under the Mohammadan Law, as a general rule, a person who completes the 15th year is

considered, without distinction of sex, to be adult and *sui juris*.

### Contracts by minors

As already observed, all contracts by minors are *void*, excepting contracts for necessaries and for minor's benefit. A deed executed by a minor is a nullity.

But if a minor, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such minor. Necessaries, of course, must be things which the minor or any one whom he is legally bound to support, actually needs, therefore it is not enough that they be of a kind which a person of his condition may reasonably want for ordinary use, they will not be necessary if he is already sufficiently supplied with things of that kind, and it is immaterial whether the other party knows this or not. Objects of mere luxury cannot be "necessaries" nor can objects which though of real use, are excessively costly. For instance, the fact that buttons are a normal part of many usual kind of clothing will not make pearl or diamond buttons "necessaries".

Costs incurred in successfully defending a suit on behalf of a minor in which his property was in jeopardy are "necessaries". And so are costs incurred, for example, in defending him in a prosecution for dacoity. A loan to a minor to save his property from sale in execution of a decree is also "necessary".

Money advanced to the manager of a joint Hindu family who is a minor at the date of the loan, for the marriage of his sister, is recoverable from the joint family property, because of the duty imposed by Hindu law on such a manager to provide for the marriage expenses of the female members of the family. Money spent on obsequies of the father of a minor are not spent on "necessaries" but a debt, incurred for the

purpose by the minor's guardian may be a debt binding on the minor and his estate under Hindu law and therefore enforceable against the minor, if after attaining his majority, he undertakes to pay it

*Contracts for the benefit of the minors*—A contract for the benefit of a minor is valid. Though a sale or mortgage of his property by a minor is void, a duly executed transfer by way of sale or mortgage in favour of a minor who has paid the consideration money is not void, and it is enforceable by him or any other person on his behalf. Similarly, a promissory note executed in favour of a minor is not void, and can be sued upon by him. A lease to a minor is, however, void as it imposes upon him obligations to pay rent and perform covenants.

The infant would also be bound by an agreement made by him to serve for a wage provided in the opinion of the court such an agreement was for his benefit. The same rule will apply in the case of contracts of apprenticeship. Where an infant applies for and is allotted shares in a company and pays the amounts due on allotment and on the first call, and subsequently repudiates while still under age, he cannot recover back what he has paid, for although he has received no dividends, he has received shares which are of marketable value. Care should therefore be taken not to allot the shares or transfer to a minor shares which are not fully paid. An infant who has applied for and been allotted shares in a company cannot repudiate the contract on attaining full age if the shares have at any time been of marketable value.

*Ratification by minor on attaining majority*—As a minor's agreement is void, it follows that there can be no question of ratifying it. Thus a promissory note given by a person on attaining majority in settlement of an earlier one signed by him while a minor in consideration of money then received from the obligee cannot be enforced in law. Where a person on attain-

ing majority pays a debt incurred by him during minority no question of ratification of a contract arises, since an agreement with a minor is merely void and not unlawful; the sum paid cannot be sued for subsequently, and in law it must be regarded on the same footing as a gift

We shall revert to this subject in a later chapter when we study the question of appointment of guardians for minors

### **Contracts by persons of unsound mind**

By English law a lunatic's contract is not void, but voidable at his option, and this only if the other party had notice of his insanity at the time of making the contract Under Indian law a contract by a lunatic is void irrespective of the question whether the mental condition of the lunatic was known to the other side or not.

A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests A lunatic differs from an idiot inasmuch as the latter is hopelessly mad & of unsound mind and has no lucid intervals during which he is perfectly sane A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind

A lunatic adjudged to be so under the Indian Lunacy Act, 1912, and of whose property a committee or manager is appointed, cannot contract in respect of his estate even though at the time of the contract he may be in a lucid interval

If a person is so drunk, intoxicated or delirious from fever as to be incapable of understanding the nature and effect of an agreement or to form a rational

judgment as to its effect on his interests, he cannot contract whilst such delirium or drunkenness lasts.

*"Necessaries" supplied to a person of unsound mind or on his account.*—As in the case of a minor, if a person of unsound mind, or any one whom he is legally bound to support, is supplied by another person with "necessaries" suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such person of unsound mind. Thus, if A supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life, A is entitled to be reimbursed from B's property.

**(B) To form a contract an agreement must have been made with the "free consent" of the parties.**

Two or more persons are said to consent when they agree upon the same thing in the same sense. A agreed to buy of B 125 bales of Surat Cotton to arrive *ex Peerlees* sailing from Bombay. There were two ships named *Peerlees* sailing from Bombay and A had in his mind one of these ships and B the other. There was no contract as the parties did not agree upon the same thing in the same sense.

Consent is said to be free when it is not caused by any of the following :— (A) Coercion, (B) Undue influence, (C) Mistake, (D) Misrepresentation; and (E) Fraud.

**Coercion**—An agreement is said to be induced by coercion when one party compels the other to enter into the agreement by (1) committing or threatening to commit an act punishable by the Indian Penal Code, or (ii) detaining or threatening to detain unlawfully any property to the prejudice of any person. A says to B—"I shall set fire to your house unless you agree to sell the house to me for Rs 1,000." B says, "All right, I will sell you my house for Rs. 1,000." This is obviously an agreement caused by coercion.

An agreement caused by coercion is *voidable* at

the option of the party whose consent was so caused. In the above instance, therefore, A will not be allowed to enforce the agreement against B and B has the right to treat the contract as void. But if B finds it profitable to sell the house, he can compel A to perform the contract

*Undue influence*—A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. A having advanced money to his son B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B, for a greater amount than the sum due in respect of the advance. A employs undue influence.

All contracts caused by undue influence are voidable at the option of the party over whom the undue influence is exercised

*Mistake*—Where *both the parties* to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. But an erroneous option as to the value of the thing which forms the subject matter of the agreement is not to be deemed a mistake as to a matter of fact. A agrees to buy from B, a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void. A bought a stove thinking that it was large enough to keep his room warm, but afterwards found out that it was too small for his purpose and wanted to return the stove and get out of the contract on the ground of mistake. He would not be allowed to do so because this was only a mistake as to judgment

Mistake nullifies consent but only when both the parties are suffering from the mistake. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a

matter of fact. If A purchases B's horse for £ 800 thinking that it had won the Derby race without B ever having induced the belief, the contract will not be void as the mistake was only unilateral.

A contract is not voidable because it was caused by a *mistake as to any law* in force in British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact. A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation. The contract is not voidable.

A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it. A and B jointly owe 100 rupees to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B. Similarly, where a railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage, and the consignee pays the sum charged in order to obtain the goods, he is entitled to recover so much of the charge as was illegally excessive.

*Misrepresentation and fraud*—A mistake makes a contract void. Such mistake is common to both the parties. It is not induced by one to mislead the other. But it is not uncommon to find one party inducing the other to enter into a contract by making a false statement which he himself may believe or disbelieve. A says to B that his horse is healthy and that B might have it for Rs. 800. B relying on the statement of A that his horse is healthy buys it for Rs. 800/-. It turns out that the horse is not healthy. If A himself believed that the horse was healthy it will be a case of innocent misrepresentation. If he did not believe so, it will be a case of fraudulent misrepresentation or fraud. In both cases B is entitled to treat the contract as not binding on him, i.e. the contract is *voidable* at the option of B. He can either treat the contract as void or compel the

other party to perform his part of the contract and put him in the position in which he would have been if the representations made had been true

To the above rule there is one *exception*, namely, that if consent is caused by misrepresentation or by silence, which is fraudulent, the contract is not voidable if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

"*Fraud*" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract.—

(1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true,

(2) the active concealment of a fact by one having knowledge or belief of the fact,

(3) a promise made without any intention of performing it,

(4) any other act fitted to deceive

(5) any such act or omission as the law specially declares to be fraudulent

Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech B says to A—"If you do not deny it, I shall assume that the horse is sound" A says nothing Here A's silence is equivalent to speech.

"*Misrepresentation*" means and includes—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true though he believes it to be true,



(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him,

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

**(c) Every agreement of which the object or consideration is unlawful is void.**

The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another or the court regards it as immoral or opposed to public policy.

An agreement is contrary to positive law or is forbidden by law when its object is to commit a crime or to defraud anybody. The law has from time to time provided that certain acts shall not be committed and has in some cases laid down that the commission of such acts would be punished. If, therefore, a contract is of such a nature as would violate or defy such a law it is void. Thus, it is unlawful for a person to draw *Hundis* on himself payable to bearer on demand according to S. 31 of the Reserve Bank Act. If any one contracts to draw such *Hundis* in contravention of this Act, the contract will be illegal and void. Similarly, where a specific kind of land or specific rights in land have been declared by the legislature to be not transferable, a transfer of such land or rights in land is void.

A contract with the object of defrauding others is also illegal and void. A case is cited where P had a patent right for a certain process in England. B entered into a contract with P for securing the sole agency for working the process in Berlin. B knew he could not exercise this sole agency right in Germany.

The object of the contract was to induce shareholders to buy shares in a company by representing that B had the right contracted for. As the object of the contract was to defraud share-holders, the contract was held to be illegal and void.

But an agreement between A and B to purchase property at an auction sale jointly and not to bid against each other, is perfectly lawful.

The consideration or object of an agreement is also unlawful when it involves or implies injury to the person or property of another. A bond which compels the executant to daily attendance and manual labour until a certain sum is repaid in a certain month and penalises default with overwhelming interest is unlawful and void, being nothing short of slavery.

An agreement opposed to morals is likewise void, e.g. an agreement made to let a house for an immoral purpose, or an agreement to print an indecent picture or book. Money lent to a prostitute expressly to enable her to carry on her trade cannot be recovered. Likewise money advanced by A to B to enable B to continue co-habitation with a dancing girl cannot be recovered. An agreement to pay money upon the consideration that the plaintiff would give evidence in a civil suit on behalf of the defendant cannot be enforced for the same reason.

Contracts having as their purpose objects which are contrary to public policy are void too because they are looked on with disfavour as being detrimental to public welfare and morals. An agreement is contrary to public policy when it is of such a nature that it tends to prejudice the general welfare of the State or the interest of the public, such as agreements which prejudice the State's interests in time of war (trading with enemies etc.) or stifling prosecutions. In private life agreements which attempt to impose inconvenient and unreasonable restrictions on the rights of individuals to freely exercise any lawful trade or calling

are opposed to public policy with certain reservations. These are called "agreements in restraint of trade."

### **Agreements in restraint of trade.**

Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent *void*. There is, however, an exception in the case of sale of goodwill of a business, namely, that one who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein, provided that such limits appear to the court reasonable, regard being had to the nature of the business. Reasonable means such as would afford the party a fair protection as far as his interests are concerned.

By implication a contract of service entered into by a person to serve another for a fixed period restrains him from serving anyone else during that period. Such restraints by implication are valid, otherwise a contract of service would be of no effect. Similarly, an agreement of service by which an employee binds himself, during the term of his agreement, not to compete with his employer directly or indirectly is not in restraint of trade.

An agreement between manufacturers not to sell their goods below a stated price, to pay profits into a common fund and to divide the business and profits in certain proportions, is not void and is not opposed to public policy. A combination among traders in a particular place to do business only among their members, paying part of their profits to a common fund and levying fines upon their members for breach of conditions laid down by the combination is not in restraint of trade and is not actionable merely because it brought profit to the combination and indirectly damaged their trade rivals. Similarly, a stipulation not

to sell for less than a fixed rate does not restrain any party to the contract from selling and is not in restraint of trade.

Every agreement in restraint of the marriage of any person, other than a minor, is void. But a condition in a *wakf* that if the widow of a co-sharer remarried she should forfeit her right to the profits under the *wakf* was upheld.

### **Agreements in restraint of legal proceedings**

Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is *void* to that extent. This rule, however, does not apply to a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. If an agreement stated that all the disputes between the parties shall be referred to arbitration and that the decision of the arbitrators shall be final, the first part of the agreement would hold good and can be enforced, whereas the second part would be void.

### **Contracts by way of wager.**

Agreements by way of wager are *void*, and no suit can be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

A wagering contract is one by which two persons, proposing to hold opposite views touching the issue of a future uncertain event mutually agree that, dependent on the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake.

neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event and, therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose or may lose but cannot win, it is not a wagering contract. Thus, if A contracts with B to the effect that A would pay to B Rs. 50/- if the horse X wins in the race and B would pay A Rs 50/- if the horse fails to win in the race, the contract is a wager, for A will win on the uncertain event of X losing in the race and B will win on the uncertain event of X winning in the race. On the other hand, where two wrestlers agree to a contest with a stipulation that the wrestler who failed to appear should forfeit Rs. 500/-, and that the winner, if the contest took place, should receive a fixed sum out of the gate-money, in a suit to recover the Rs. 500/- the defence of gaming and wagering failed.

*Stock transactions*—Wagering contracts may assume a variety of forms, and a type very common is that which provides for the payment of differences in stock transactions, with or without colourable provisions for the completion of purchases. The usual point in such cases is to examine the real nature of the agreement as a whole.

Two parties may enter into a formal contract for sale and purchase of goods at a given price and for their delivery at a given time. If, however, *the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time* that is not a commercial transaction but a wager on the rise or fall of the market. It was held to

hold good in the case of certain contracts entered into in Dholera for the sale and purchase of Broach Cotton, a commodity which it was admitted never found its way either by production or delivery to Dholera

**Speculative transactions**—Speculative transactions must be distinguished from agreements by way of wager. This distinction comes into prominence in a class of cases where the contracts are entered into through brokers. The *modus operandi* of the defendant in this class of cases is, when he enters into a contract of purchase, to sell again the same quantity deliverable at the same time in one or more contracts, either to the original vendor or to some one else, so as either to secure the profit or to ascertain the loss, before the *vaida* (settling) day, and, when he enters into a contract of sale, to purchase the same quantity before the *vaida* day. This mode of dealing, when the sale and purchase are to and from the same person, has the effect, of course, of cancelling the contracts, leaving only differences to be paid. When they are to different persons, it puts the defendant in a position vicariously to perform his contracts. This is, no doubt, a highly speculative mode of transacting business, but the contracts *are not wagering contracts unless it be the intention of the contracting parties at the time of entering into the contracts, neither to call for nor give delivery from or to each other*. Speculation does not necessarily involve a contract by way of wager and to constitute such a contract a common intention to wager is essential

When contracts are made by "bought and sold notes" through a broker, so that the principals are not to be brought into contract with each other until after the bought and sold notes are executed, a presumption is raised against the existence of a *common intention* to wager. Similarly, where the contracts are made by the broker with third persons in his own name on behalf of the defendant according to the practice of the trade, the presumption against the existence of a *common intention* to wager is still stronger, for the

defendant may not know at all with whom the broker had contracted on his behalf. The broker may be a *sutta* broker or a mere agent for gambling but this fact is immaterial, for he is not a contracting party, and it is the intention of the contracting parties alone that is material in these cases.

**Badm transactions—** Where the transactions which parties enter into are beyond their means and there is no intention on the part of either contracting party from the very beginning to give or take delivery, the transactions are *badm*. Claims arising out of *badm* transactions are inadmissible as being agreements by way of gaming or wagering. In the case of *badm* transactions the commission agents can recover from their principals only if they have made actual payments on their behalf to third parties or have incurred enforceable liability.

It is to be observed that a *satta* transaction need not be a gambling transaction if either of the parties intends to make delivery of the goods. So where the contract for sale of goods specifically provides that the goods would be delivered after weighing them it is not *badm*, and where the purchaser asks for delivery and is not replied that delivery was not contemplated, the mere fact that the contract involved very large quantities of goods does not make the contract *badm* though it is a highly speculative forward contract.

**Teji Mandi transactions—** The transactions under this denomination are divided into three classes *viz* (1) *Teji* pure and simple, (2) *Mandi* pure and simple and (3) *Teji Mandi* or both the transactions combined.

In the case of *Teji* pure and simple, what the dealer A does is to secure an option to buy a certain quantity of goods, say 100 bales of cotton, at Rs. 500/ per bale. In consideration of this option being given to him by merchant B who deals in *Teji*, he pays him a premium of say Rs. 10/ — on each bale. The option

here is to purchase and take delivery of these bales at some future date, as fixed by both these parties at the time of the contract, if it suits A, or failing that A is free to abandon the option. The option premium paid is of course non-returnable in either case. B is known as *Khammar* i.e. 'the Eater' of the option and A the buyer is called the *Lagadnar* i.e. the applicant of the option.

On the same principle, in the case of *Mandi*, if A thinks that the market is going to fall, he secures an option from B to sell a certain number of bales, say at Rs. 500/ — per bale to B, on payment of option premium, to be delivered at some future date fixed by the parties.

In the combined *Teji Mandi* transaction, one party buys what is known as a double option and pays a certain premium over the contract price of the commodity. This gives him the right to buy or sell a certain quantity at the price fixed by this agreement on the settling day either of the market concerned or as fixed by the agreement. Thus, if A buys a *Teji Mandi* of say silver at 26 annas per tola and for that purpose pays two annas per tola for the *Teji* and other two annas for the *Mandi* what he would do would be that if on the settling day the price rises over 26 annas, say it is 32 annas, he may buy the agreed quantity making a net profit of 2 annas per tola, after deducting 4 annas per tola paid by way of premium on each transaction. If, on the other hand, the market falls to, say, 20 annas, he would sell the quantity at 26 annas per tola and recover six annas per tola of which two annas per tola would be his net profit after deducting four annas per tola paid for the option premium.

The presumption is that a *Teji Mandi* is not a mere wagering transaction. Contracts are not wagering contracts unless it be the intention of both the contracting parties, at the time of entering into the contracts,



under no circumstances to call for, or give delivery, from, or to, each other.

### **Insurance policies.**

A contract of insurance is not a wager because the party insured has an interest apart from the wager. Thus, in a contract of fire insurance, the insured's object is to be able to indemnify himself in case he suffers loss due to fire. In the same way, in a contract of life insurance the object of the insured is to secure a compensation for his dependents in the event of his death. A *bona fide* insurance contract is not a wager. But an insurance effected by one party on the life of another in whose life he has no interest is a wagering contract. In one reported case the defendant company issued a policy for a term of 10 years for Rs. 25,000 on the life of Mst. Mehbub Bi, the wife of a clerk in the employ of the plaintiff's husband. About a week after Mst. Mehbub Bi assigned the policy to the plaintiff. Mst. Mehbub Bi died a month later and the plaintiff as assignee of the policy sued to recover Rs. 25,000 from the defendants. It was held on the evidence that the policy was not effected by Mst. Mehbub Bi for her own use and benefit, but had been effected by the plaintiff's husband for his own use and benefit, and that it was void as a wagering transaction, he having no interest in the life of Mst. Mehbub Bi.

### **Lotteries and races.**

Wagering contracts are not generally illegal but have been declared void by the Indian Contract Act. But section 294-A of the Indian Penal Code makes it penal to keep any office or place for the purpose of drawing any lottery not authorised by Government or to publish any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person on any event or contingency relative or applicable to the drawing of any ticket, lot, number, or figure in any such lottery.

Where a particular association is authorised by

Government by a letter to hold a lottery, the effect is that no prosecution would lie under the criminal law. But a sale or purchase of a ticket in such a lottery will still be a wagering contract within the meaning of the Indian Contract Act as well as under the Bombay Avoiding of Wagers (Amendment) Act, 1865; for the Government cannot by a letter overrule the Central Act or the Acts of the Provincial Legislature.

What is a lottery? "Lotteries ordinarily understood are games of chance in which the event of either gain or loss of the absolute right to a prize or prizes by the person concerned is made wholly dependent upon the drawing or casting of lots, and the necessary effect of which is to beget a spirit of speculation and gaming that is often productive of serious evils." It was so stated in a Madras case where an agreement was entered into between twenty persons whereby it was provided that each should subscribe Rs. 200/- by monthly instalments of Rs. 10, and that each in his turn, as determined by lot, should take the whole of the subscriptions for one month. The defendant contributed Rs. 10/- every month for a period of ten months, and in the tenth month he got his lot of Rs. 200/- Thereupon a bond was taken from him by the plaintiff, who was the agent in the business, for the remaining Rs. 100 in order to ensure the future regular payment of monthly instalments for the further period of ten months. It was held in a suit upon the bond that the transaction did not amount to a lottery.

Similarly, a "Chit-fund" plan under which all subscribers are repaid their capital by a fixed date, though some determined by lot get more and sooner, is not a lottery. Where the members subscribed for the purpose of obtaining a gramophone a week, the weekly winner to be ascertained by lot, until all were supplied, the scheme was held not to be a lottery.

Where certain persons purchased a ticket of the Calcutta Turf Club Sweep and drew a horse which

won the prize and where one of these persons knowing the fact sold half his chance, it was held that the agreement was not a wagering contract.

A prize-chit transaction, in which the prize winner is ascertained by drawing lots and is under no liability to pay future subscriptions after the prize is won and whose extent of gain depends upon the change of the draw amounts to a lottery.

A transaction requiring skill for winning prizes is not lottery. The accused published a newspaper containing an advertisement of a "coupon competition", which was to be carried out by means of coupons, to be filled up by the purchasers of the paper with the names of the horses selected by the purchasers as likely to come in first, second, third and fourth in a race. For every coupon filled up after the first the purchaser paid a penny, and the accused promised a prize of £ 100 for naming the first four horses correctly. The transaction was held not to amount to a lottery. An agreement to settle dispute by a lottery is *ab initio* void.

A subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards to be awarded to winner or winners of any horse-race, is not unlawful. But this will not legalise any transaction connected with horse-racing, to which the provisions of section 294-A of the Indian Penal Code apply.

### **Agreement without consideration generally void.**

The third requisite to make an agreement a contract is that it must be made for lawful consideration. Subject to certain exceptions, an agreement made without consideration is *void*.

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a *consideration* for the

promise. Thus, "a valuable consideration in the sense of law may consist either in some right, interest, profit, or benefit accruing to the one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other".

Consideration may be *executory* or *executed*. A promises to sell his house to B for Rs. 8,000/-, in consideration of his promise to pay Rs 8,000/- three months hence. The consideration of A's promise is only a promise from B to do something in the future. The consideration in this case which is itself a promise is *executory*. A offers B Rs. 10/- provided B runs from Delhi Gate to Connaught Circus. There will be no consideration for A's promise even though B accepts the offer unless and until B has actually run from Delhi Gate to Connaught Circus. B by so running executes the consideration which makes A's promise a binding contract. This is an *executed* consideration.

Under the Indian law part consideration is also a good consideration. A rendered service to B at his desire expressed during his minority and continued doing him service at the same request after his majority. The question arose whether such service constituted a good consideration for a subsequent expressed promise by B to pay an annuity to A. It was held that the agreement which was for compensating for past services rendered, was a valid one.

*Exception to the rule 'no consideration no contract'.* The Indian Contract Act dispenses with consideration in the following cases of contracts which are valid and binding, even though they are made without consideration.

(1) When the contract is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other. A, for natural love and affection, promises to give his son, B, Rs. 1000/.

A puts his promise to B into writing and registers it. This is a contract.

It is to be observed that in every case falling in this category, natural love and affection has to be proved and parties standing in a near relation to each other, do not necessarily imply mere relatives. A promise by the husband to provide maintenance to his wife is void, as it is obvious in this case that no natural love and affection exists between the husband and the wife.

It is also to be remembered that a gratuitous promise under this provision can only be enforced provided it is in writing and is registered.

(2) When the contract is a promise to compensate wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do. A finds B's purse and gives it to him; B promises to give A Rs. 50/. This is a contract. A supports B's infant son. B promises to pay A's expenses in so doing. As the promise is based on A's voluntarily doing some thing which B was legally compellable to do, A can enforce this promise.

(3) Where the contract is a promise to pay a time-barred debt without consideration, provided the promise is in writing and signed by the promisor or his duly authorised agent. According to the statute of limitation, a debt cannot be recovered by the creditor after the period of limitation has expired unless the debtor or his authorised agent acknowledges the debt or makes payment either towards principal or interest before the expiration of the period of limitation. But the above rule gives the creditor the right to enforce payment of the debt, even after the expiration of the period of limitation and even in the absence of acknowledgment or payment provided the debtor or his duly authorised agent promises in writing after the expiration of the period of limitation to repay the debt. The subsequent promise in this case, though without consideration, is valid and enforceable.

(4) The contract of agency requires no consideration

(5) The validity, as between the donor and donee, of any gift actually made is not affected by the above rules.

It is to be noted that an agreement to which the consent of the promisor is freely given is not void merely because the consideration is *inadequate*; but the inadequacy of the consideration may be taken into account by the court in determining the question whether the consent of the promisor was freely given

#### **Some other contracts noted**

(i) Agreements having for their object the creation of monopolies are void as opposed to public policy

(ii) An agreement by which a litigant binds himself to pay a some of money to his pleader's clerk for giving special attention to his legal business which the pleader is bound to see to in consideration of his fee is opposed to public policy, and consequently cannot be enforced.

(iii) An agreement between persons not to bid against one another at an auction sale is not necessarily unlawful, but it may be so if the purpose is to defraud a third party

(iv) The interest of the public might suffer if bargains relating to public offices are upheld, as their effect is to prevent such offices being filled by the best available persons. Thus, the office of *mutwali* of a *teakf* is not transferable, nor land which is the emolument of a religious office. The sale of the office of a *shebait* is similarly invalid. So also, an agreement to pay money to a public servant to induce him to retire and thus make way for the appointment of the promisor is virtually a trafficking with reference to an office, and is void

(v) Agreements tending to create interest agai-

not duty are not enforceable. This principle underlies the rule that an agent must not deal in the matter of the agency on his own account without his principal's knowledge. If a person enters into an agreement with a public servant which to his knowledge might cast upon the public servant obligations inconsistent with public duty, the agreement is void.

(vi) Every agreement to pay money to the father or guardian of a girl in consideration of his consent to the marriage of the girl is not unlawful, and each case must be judged by its own circumstances. Where the parents of the girl are not seeking her welfare, but give her to a husband, *otherwise ineligible*, in consideration of a benefit to be secured to themselves, an agreement by which such benefit is secured is opposed to public policy and ought not to be enforced. So also, an agreement to pay money to the parent or guardian of a minor in consideration of his consenting to give the minor in marriage, is void as being opposed to public policy. But in the Punjab a family arrangement of inter-marriages of sons and daughters of various families known as *bil mawaza* amongst persons of the same class, by which the family A gives a girl to be taken as a wife on equal terms into a family B, and a girl of the family B is at the same time given as a wife into family A, has been held not opposed to public policy and therefore not void.

(vii) Any agreement for the purpose or to the effect of using improper influence of any kind with judges or officers of justice is void.

(viii) The practices forbidden under the names "champerty and maintenance" may be summarily described as the promotion of litigation in which one has no interest of one's own. Agreements of this kind are equally illegal and void whether the assistance to be furnished consists of money, or, it seems, of professional assistance, or both. They are in practice often found to be also disputable on the ground of fraud or undue influence as between the parties,

### Contingent contracts.

A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not, happen. A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

All contracts of insurance and indemnity are obviously contingent. So are many other kinds of contracts in both great and small matters. A builder's right to recover his bill for the work actually done is frequently made by agreement contingent on the architect certifying it as satisfactory, and so on.

*Enforcement of contingent contracts* — Contingent contracts to do or not to do anything if an uncertain *future event happens* cannot be enforced by law unless and until that event has happened. If the event becomes impossible such contracts become void. A makes a contract with B to sell a horse to B at a specified price, if C to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse. Similarly, when A contracts to pay B a sum of money when B marries C and C dies without being married to B, the contract becomes void.

Contingent contracts to do or not to do anything *if an uncertain future event does not happen* can be enforced when the happening of that event becomes impossible, and not before. A agrees to pay B a sum of money if a certain ship does not return. The contract can be enforced when the ship sinks.

If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become *impossible* when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies. A agrees to pay B a sum of money if B marries C. C marries D. The marriage of B to C must



now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time, become void if, at the expiration of the time fixed, such event becomes impossible. Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened or, before the time fixed has expired, if it becomes certain that such event will not happen. A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year; and becomes void if the ship is burnt within the year. Again, A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

*Agreements contingent on impossible events void—* Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made. A agrees to pay B 1,000 rupees, if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

### **Performance of contract**

A contract, being an agreement enforceable by law, creates a legal obligation, which subsists until discharged. The parties to a contract must therefore either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of any law for the time being in force. Promises bind the representatives of the promisors in case of the death of such promisors before the performance *unless a contrary intention appears from the contract*. A promises to paint a picture for B, by

a certain day, at a certain price A dies before the day. The contract cannot be enforced either by A's representatives or by B

Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract. Every such offer, however, must fulfil the following conditions :

(i) it must be unconditional,

(ii) it must be made at a proper time and place and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;

(iii) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver

The offer of performance must be not only unconditional, but entire, that is, it must be an offer of the whole payment or performance that is due. For instance, a lender is entitled to decline, in the absence of any agreement as to repayment of the loan, to receive payment of the sum due to him in instalments, and he can claim that the whole sum due be paid at one and the same time. But when payment of money or delivery of goods in instalments is provided for by the contract, a tender of instalments is a good tender.

### **Discharge or termination of contracts**

A contract, as we have seen, involves a promisor and a promisee. The promisor and the promisee each enters into certain obligations. When these obligations come to an end, it is said that the contract has been discharged or terminated.

A contract may be discharged in any one of the following ways.

1. By performance or fulfilment.
2. By fresh agreement.
3. By impossibility of performance.
4. By breach or renunciation of contract
5. By operation of rules of law.

### **Discharge by performance.**

A contract, being an agreement enforceable by law, creates a legal obligation, which subsists until discharged. The parties to a contract must, therefore, either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of the Indian Contract Act, or of any other law. Performance is the most common way of discharging contractual liability

*Who must perform the contract*—In a contract where the special skill and personal qualifications of the promisor are essential to the contract, performance must be by the *promisor* himself. In other cases the promisor or his representatives may employ a competent person to perform it. Thus, if a painter contracts with me to paint my portrait, the painter must paint the portrait himself for his personal skill and qualifications are what I bargained for. He cannot rely on another painter to do the job. But if I have a contract with a grocer to supply me with Rs. 10/. worth of sugar and tea every week, it matters not to me from whom the sugar and tea might come so long as they are of the same quality as I bargained for.

When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

*Time and place of performance*—Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for perfor-

mance is specified, the engagement must be performed within a reasonable time. The question what is a reasonable time is, in each particular case a question of fact.

When a promise is to be performed on a certain day and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed. In the absence of a custom to the contrary a person is bound to deliver the goods even on Sunday, if required so under the contract.

When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place. The Bombay High Court has held that the Common Law rule about payment that the debtor must seek his creditor does not apply to negotiable instruments. In the case of *pakki adat* agency the place of payment is the place where the constituent resides, unless he has chosen to fix another place by express direction.

*When time essence of contract* — When a party to a contract promises to do a thing at or before a specified time and fails to perform the contract at or before the specified time, the promisee can treat the contract as void and avoid the contract, only if it was the intention of the parties that time should be the essence of the contract. If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the

failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

In mercantile transactions time is usually deemed to be the essence of contract unless otherwise provided. But in the case of sale of land time is not regarded as the essence unless otherwise provided.

A agrees to sell and deliver 6 candies of cotton to B on 12th July 1946. A fails to deliver the goods on that day. On 4th September 1946, B writes to A stating that if A failed to deliver the cotton within a week, he will claim damages according to the market rate at the date of the letter. A takes no notice of this letter. On 3rd October, 1946, B writes another letter to A stating that as A failed to deliver the goods he would claim damages on the footing of the market rate at the date of the second letter. B is not entitled to damages on that footing, but to the difference between the contract rate and the market rate on 12th July, 1946, the latter being the date of the breach.

*Effect of refusal to accept offer of performance—*

Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance nor does he thereby lose his rights under the contract. Every such offer must fulfil the following conditions:

- (i) it must be unconditional,
- (ii) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascer-

- . taining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do,

(iii) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

*Effect of neglect of promise to afford promisor reasonable facilities for performance*—If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby. Thus, where A contracts with B to repair B's house and B neglects or refuses to point out to A the places in which his house requires repair, A is excused for the non-performance of the contract if it is caused by such neglect or refusal

*Effect of refusal of party to perform promise wholly*—When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract unless he has signified by words or conduct, his acquiescence in its continuance. A, a singer, enters into a contract with B, the manager of a theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract. But if with the assent of B, A sings on the seventh night, B has signified his acquiescence in the continuance of the contract, and cannot put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

Where a servant or a clerk, who is engaged by the month, leaves his employer's service wrongfully in the course of the then current month, he is not entitled to any salary for the broken portion of the month

in the course of which he left the service.

Disability due to the party's own fault must, however, be distinguished from inability to perform which has already been dealt with.

*Legal tender of money*—A creditor is not bound to accept a cheque, but if a cheque is tendered and received, and the creditor or his agent objects only to the amount, or makes no immediate objection at all, he cannot afterwards object to the nature of the tender. Downright refusal by the creditor to accept payment at all precludes any subsequent objection to the form of the tender.

The money tendered must be current coin of the country. In British India under the Indian Coinage Act, 1906, silver rupees and half rupees are legal tenders up to any amount and silver quarter rupees, nickel coins and bronze coins, for any sum not exceeding one rupee. If a person therefore purchases goods worth two rupees from a shopkeeper and tenders him eight quarter-rupees in payment of the same, the shopkeeper can refuse to accept payment in these coins.

By the Reserve Bank of India Act, 1934, every bank note shall be a legal tender at any place in British India in payment or on account for the amount expressed therein and shall be guaranteed by the Central Government. Bank notes are of the denominational value of five rupees, ten rupees, fifty rupees and one hundred rupees, those of one thousand rupees and ten thousand rupees having been recently withdrawn. To this have been added bank notes of the denominational value of two rupees. The Central Government have also issued Government of India notes of the denominational value of one rupee, and under Ordinance No 95 of 1940 any such note is current in British India in the same manner and to the same extent and as fully as the silver coin called the Government rupee issued under the provisions of the Indian Coinage Act, 1906.

*Performance of reciprocal promises—transfer of*

*shares*— When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

In the case of a contract for the sale of shares in a company it is not necessary, in order to prove that a vendor was ready and willing to perform his part of the agreement, that he should be the beneficial owner of the shares, or that he should tender to the purchaser the final documents of title to the shares. It is enough that he should be able and willing to constitute the purchaser the legal owner of the shares agreed to be sold. Thus, where the vendor tendered to the purchaser share-allotment and receipt papers, and together with each a transfer paper and an application paper, *both signed in blank by the original allottee*, it was held that the vendor was ready and willing to perform his promise. But where neither the transfer nor the form of application for transfer was offered to the purchaser, nor had the vendor any such documents signed by the original allottee in his possession, it was held that the vendor could not be said to be ready and willing to perform his promise, or the allottee had it in his power to decline to complete the contract until he had executed the transfer and the application papers. Further, it is not necessary to prove readiness and willingness that the vendor should have made an actual tender to the purchaser of the transfer deed. Nor is it necessary that the vendor should have the shares in his possession continuously from the date of the contract down to the time of performance. If a party bound to do an act upon request is ready to do it when it is required he will fully perform his part of the contract, although he might happen not to have been ready had he been called upon at some anterior period. But where the purchaser before the day fixed for delivery gives notice to the vendor that he will not accept the shares, or where he has absconded or is so financially embarrassed that he could not have paid for them if they had even delivered, the vendor is



exonerated from giving proof of his readiness and willingness to deliver the shares.

*Order of performance*—Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order, and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

When a contract consists of reciprocal promises such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract. A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

## **(2) Discharge by fresh agreement.**

The parties to a contract may, by a fresh agreement, discharge the old contract. This can be done in three ways, namely (a) Rescission, (b) Alteration and (c) Novation.

(a) *Rescission*—Rescission simply means rescinding or cancelling the original contract by mutual agreement whereby the old contract ceases to be bind-

ing on any of the parties. If the parties to a contract agree to rescind it, the contract need not be performed. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit. A owes B Rs.5,000. A pays to B and B accepts, in satisfaction of the whole debt, Rs.2,000 paid at the time and place at which the Rs 5,000 were payable. The whole debt is discharged.

When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained.

(b) *Alteration*—Alteration means substituting a fresh contract with altered or different terms from the original one. A agrees to supply B 600 yards of white crepe at Rs. 10/- a yard within eight months. Later on A and B alter the agreement in the following way. A agrees to supply 500 yards instead of 600 and within twelve months instead of eight. The latter agreement puts an end to the former.

Alteration must be with the consent of all the parties to the contract. If one of the parties to the contract, while the deed relating to the contract is in his custody, makes an alteration *without the consent of the other* party, either by erasure or addition, and if that alteration is material, the result is that the whole contract is discharged in so far as he is concerned. The consequence is the same if a stranger made this alteration while the document was in the possession of a party to the contract. The only exception that can be pleaded in such a case is that the alteration was made through a mistake or accident.

A material alteration is one which alters the legal effect of the contract. Thus where the date of a bond is altered the alteration is material and must be held to avoid the bond. Similarly, an alteration on a bill of exchange from D.P. to D.A. was held to be a

material alteration which avoided the contract.

(c) *Novation*—Novation takes place when there being a contract in existence, some new contract is substituted for it either between the same parties (for that might be) or between different parties, the consideration mutually being the discharge of the old contract. The usual and the most common form of novation is substituting a new debtor in place of an old one with the consent of the creditor. For instance, A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

The most essential point in the case of novation is that the original debtor goes out and the liability of the new contracting party is accepted in his place. A common instance of it in partnership cases is where upon the dissolution of a partnership the persons who are going to continue in business agree and undertake as between themselves and the retiring partner, that they will assume and discharge the whole liabilities of the business, usually taking over the assets, and if, in that case, they give notice of that arrangement to a creditor, and ask for his accession to it, there becomes a contract between the creditor who accedes and the new firm to the effect that he will accept their liability instead of the old liability, and on the other hand, that they promise to pay him for that consideration.

### **(3) Discharge by impossibility of performance.**

Impossibility may be a good answer to an action for non-performance of a contract. An agreement to do an act impossible in itself is void. This does not mean that the debtor has not the means to perform or pay as the case may be. It means that the contract is legally or physically impossible to be performed.

Thus, if I agree to supply you with one hundred tons of coal a month for twelve months and there should be a coal strike and I cannot get the coal to sup-

ply you with I shall still be liable for breach of contract for not supplying it. But if I agree to supply one thousand tons of coal a month shipped from Cardiff to Havre and the Government closes the port of Cardiff and will not allow me to export the coal, the contract has become legally impossible for me to fulfil.

It happens very often that parties to a contract undertake to do certain things which are by no means impossible but which become impossible to perform later on due to causes beyond their control. This is called *supervening impossibility*. In such a case the contract is discharged and becomes void and the party who has received any advantage under it, is bound to restore it to the other party.

Impossibility may arise due to change in law. For instance, a contract to supply goods from a country against which war is subsequently declared will be discharged as it will be illegal to supply such goods. Or, it may arise due to the destruction of things or persons vital to the contract. Thus, where A agreed to let a music hall to B for a series of concerts and subsequently the music hall was destroyed by fire, it was held that as the existence of the music hall was the foundation of the contract, the contract was discharged with the destruction of the hall.

Again, impossibility may be due to non-occurrence of contemplated events or state of things. Where the happening of a future event or the continued existence of a certain state of things are contemplated by the parties as the only *foundation* of the contract, the contract is discharged when the event does not happen or the state of things comes to an end. This is called discharge under a condition. A condition is something on which the whole contract rests. It may be either (i) a condition precedent, or (ii) a condition subsequent, or (iii) a concurrent condition. A agrees to take the house of B provided the drains are in order. A will not be bound to take the house unless the drains are in order. There is a condition *precedent*.

A takes the lease of B's house for three years with the provision that the lease shall terminate whenever the drains will go out of repair. Here, if after one year the drains get out of repair, A can terminate the lease. This is a case of condition *subsequent*. A and B contract that A shall deliver goods to B to be paid for by B on delivery. A need not deliver the goods unless B is ready and willing to deliver them on payment. This is an example of *concurrent* conditions.

It sometimes happens that in commercial ventures some unforeseen delay happens, without the fault of either party to the contract, of such a nature that the fulfilment of a contract is so inordinately postponed, that, when the delay is over, fulfilment will not accomplish the only object which both parties must have known they had in view when they made the contract, and for the accomplishment of which it was made. This is the doctrine of *frustration* though it is very sparingly applied. Similarly, where from the terms of the contract and the surrounding circumstances it can be inferred that the happening of some future events or the continuance of some state of things must have been contemplated by both the parties as the basis of the contract, the law will imply that the contract is made subject to a condition subsequent and that it is to be dissolved if the event does not take place or if the state of things changes. This implied condition only excuses the performance if subsequently the whole contract becomes impossible of performance through some cause for which neither party is responsible. This cause must be such as to frustrate altogether the performance of the contract

In a reported case, Henry agreed to hire a flat belonging to Krell on certain days on which coronation procession of King Edward VII was arranged to pass. Krell's flat was on the published route of the procession. Afterwards the procession was abandoned on the days originally fixed due to the King's illness. It was held that the abandonment of the coronation

procession owing to the illness of the King totally upset the performance of the contract as the contract was interpreted as one for the letting of the flat solely for the purpose of viewing the coronation procession and as the taking place of the coronation procession was regarded by both the contracting parties as the sole foundation of the contract. This foundation having been destroyed, the contract was discharged and Henry had no liability as regards the rent of the flat.

#### **(4) Discharge by breach or renunciation.**

Where one party to a contract breaks the contract or shows by his conduct or words unwillingness to carry out his part of the contract, the other party is entitled to treat the contract as discharged. He has two remedies, *viz*, (1) to treat the contract as discharged and to sue the offending party for breach of contract, or (2) to treat the contract as still binding in case the time for the performance of it has not yet arrived and compel the other party to perform his part when the time for it comes.

When one party to a contract shows by conduct or words his unwillingness to perform his part of the contract or is incapacitated in such a way as not to be able to perform, the other party can treat such a conduct as *an anticipatory breach of contract*.

#### **(5) Discharge by operation of law.**

In certain cases contracts are discharged by the operation of certain laws even though such contracts be valid in every respect. Thus, under the Limitation Act certain contracts become discharged after the lapse of a prescribed period of time and parties to such contracts cannot sue on them after the expiry of the prescribed period of time. Similarly, when an insolvent is discharged by the Insolvency Court, all his contracts are discharged by the operation of the Law of Insolvency.

#### **Breach of contract.**

The law aims to restore an injured party to the

condition he was in before the wrong was done. This is brought about, in the case of breach of contracts, by giving the injured party a right of action for damages.

Breaches of contract are of two kinds, either of which gives a cause of action to the party injured by the breach, (a) *actual breach*—this happens when a party does not perform his promise in the manner and at the time stipulated by the contract; (b) *anticipatory breach* or *breach by renunciation*—this happens when before the time for performance a party shows by his conduct or words his unequivocal intention of not performing the contract, or makes himself incapable of performing the contract.

*Remedies for breach of contract* — In case of a breach of contract, the party injured has the following remedies :—

(i) He can treat the contract as discharged and not binding on him and claim damages for the breach of contract.

(ii) He can claim a *quantum meruit*, i. e. a reasonable sum as reward for anything that he may have done under the contract.

(iii) He can claim damages in an action upon the contract.

*Quantum Meruit* literally means paying a person as much as he has earned. Where a person supplies another person with goods or works at the latter's request without any remuneration being fixed beforehand, the law always implies a reasonable remuneration for the goods supplied or work done. This reasonable remuneration is known as *quantum meruit*. From the point of view of breach of contract, however, an action for *quantum meruit* arises in a different way. A contracts with B to build the latter's house for Rs. 30,000/-. After A has proceeded with the work for sometime and before the building is completed, B repudiates the contract and prevents A from proceeding with the work. In this case A can claim a *quantum*

*meruit* for the work he has already done. He can further sue B for damages for breach of contract

*Damages* — A person who suffers cannot be expected to be compensated for all the losses he can trace to the breach of the contract. He is entitled to compensation for only such losses or damages as (i) *arise naturally* from the breach of contract, or (ii) which the parties knew, when they made the contract, to be likely to result from the breach of it. No compensation is to be given for any remote and indirect loss or damage sustained by reason of the breach. In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must also be taken into account. This is based on the principle that a party who suffers loss from a breach of contract is bound to do all that a reasonable and prudent man would do to mitigate the loss. For instance, if A agrees to buy cotton from B for the purpose of running his textile mill and B fails to supply the cotton, A should buy cotton elsewhere and sue B for the difference in price, and he must not increase his loss by letting his mill close down and incurring other liabilities if he can get similar cotton elsewhere.

### Special damages

Special damages arise under special circumstances where the party to the contract has made a specially advantageous bargain through which he expects to make specially large profits which profits are likely to be lost through the breach of the contract. Special damages are also only recoverable if (a) the special circumstances were known to both the parties at the time of making the contract, or (b) the damages are such as would naturally result from the breach of a contract so made. To take an illustration, A has entered into an advantageous contract, say, to supply iron rails to a Railway Company, which he covers by a contract with



an Iron Company. These rails are to be delivered at dates specifically stipulated. A expects to make a large profit on the difference. The Iron Company fails to keep the contract (and thus the Railway Company rescinds its contract) with A. The price at which A was to supply these rails to the Railway Company was much higher than the market rate on the dates of delivery. In this case A can recover only the difference on the basis of the market price from the Iron Company unless A had made it clear to his seller (Iron Company) that the breach of contract by them would involve him in a special loss through his failure to keep the advantageous contract. Here also it must be noted that if A could have bought those rails in the market in sufficient quantity to meet his buyer, the Railway Company, he should have done that in order to mitigate the damages, because "a person with whom a contract has been broken has a right to fulfil that contract for himself as nearly as may be, but he must not do this unreasonably or oppressively as regards the other party, or extravagantly."

### **Exemplary damages.**

Exemplary damages are specially penal and heavy damages awarded by courts in cases such as a breach of promise to marry where the injured feelings of the party aggrieved are also taken into account and in action against bankers for refusing to honour a customer's cheque when they have funds of his to meet it. Exemplary damages are not recoverable in the case of the breach of mercantile contracts because the main object of law here is to compensate the party aggrieved and not to punish the other side.

### **Liquidated damages and penalties.**

In many contracts the parties stipulate at the time of making the contract that a specified sum shall be payable for breach of it. The sum so fixed may be either:—

- (i) Liquidated damages : *e.* a sum payable as

damages the amount of which is determined by the parties beforehand, instead of being left to court, by a fair and honest estimate of probable losses likely to be caused by the breach, or

(ii) A penalty, i.e. a sum which has no relation to probable losses which may arise and which has been stipulated by the parties *as in terrorem* i.e. for the purpose of penalising a party who might break the contract.

If in the case of a breach of contract the court finds that a sum stipulated as damages in the contract is in the nature of liquidated damages, the court awards such a sum as damages without either increasing or reducing it. If, however, the court finds that the stipulated sum is in the nature of a penalty, the court *can* award such sum as damages, not exceeding the sum stipulated as the court thinks fit.

Whether stipulated sum is in the nature of liquidated damages or penalty is in every case determined by the court with reference to all the facts and circumstances of each case. A sum specifically mentioned as damages may still be found to be a penalty by the court if it thinks that the damages mentioned are excessive and unconscionable or bear no true relation to the loss which may result from a breach. A contracts with B to pay Rs 1000/- if he fails to pay B Rs 500/- on a given day. A fails to pay Rs 500/- on that day. B is entitled to recover from A such compensation, not exceeding Rs 1000/- as the court considers reasonable. The reason is that the sum of Rs 1000/- bears no relation to the loss which B might suffer for the failure of A to pay Rs. 500/- on the given day. Rs 1000/- is surely excessive and unconscionable.

*Exception* — When any person enters into any bail-bond recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the Central Government or of any provincial Government, gives any bond for the perfor-

mance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein. A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

### **Stipulations for interest.**

With regard to interest the law in India has been that, in case it is agreed that a certain rate, say 8 per cent, is to be paid by way of interest and that the principal with interest at that rate has to be paid on a particular date, with a stipulation that if the money is not paid on the due date, interest at a higher rate, say 12 per cent, would run *from the due date of payment*, it would not amount to a penalty. It would amount to a penalty if it were stipulated that the higher rate in case of default was to be calculated *from the date of the loan or contract*.

*Interest by way of damages*—The Interest Act of 1839 lays down that in case a debt or certain sum is due as per any written instrument on a particular date the court may, at its discretion, allow interest on it at the usual current rate. If the sum is payable otherwise than under a written instrument, the court may allow interest if after the sum is due the creditor makes a demand in writing giving notice to the debtor that interest will be claimed from the date of such demand to the date of payment.

*Excessive interest*—Before the passing of the Usurious Loans Act, 1918, the courts in India had no power to interfere and reduce interest in case an excessive rate was provided for on a loan or any other transaction. This naturally led to great hardship and decrees were frequently passed allowing claims for interest, at absurd percentages. The Usurious Loans Act (section (3) however, provides that where —“in any suit to which this Act applies, whether heard *ex parte* or other-

wise, the court has reason to believe —

(a) that the interest is excessive, and

(b) that the transaction was, as between the parties thereto, substantially unfair,

the court may exercise all or any of the following powers, namely, may—

(i) re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest,

(ii) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation re-open any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof,

(iii) set aside either wholly or in part, or revise or alter any security given or agreement made in respect of the loan, and if the creditor has parted with the security, order him to indemnify the debtor in such a manner and to such extent as it may deem just "

These powers will not of course allow a court to reopen transactions already closed

It will thus be seen that the courts can even on their own motion interfere in those cases where in their opinion the transaction is "substantially unfair" In considering whether the interest is excessive the court is expected to take into consideration the risk incurred as on the date of the loan from the creditor's standpoint and for that purpose the presence or absence of security, its value, financial condition of the debtor, and the result of previous transactions (if any) of the debtor must be taken into account

### **Other remedies for breach of contract**

Apart from the remedies mentioned above there

are two more remedies open to a party injured by a breach of contract, namely—

(1) *Specific performance*: In certain cases of contracts damages do not give adequate relief to a party who suffers from a breach of contract. There the party breaking the contract is compelled by the court to perform his part of the contract by a decree of *specific performance*. B has a piece of antique. B contracts to sell the antique which A's father gave him. Afterwards he refuses to sell. Here the award of damages will not give A adequate relief. He does not want the money but the article. In such a case the court will issue a decree for specific performance to compel B to complete the sale. It is obvious that specific performance is granted only in rare cases.

(2) *Injunction*: An injunction is an order of the court restraining a party to a contract from breaking the contract. This is also granted in rare cases where damages fail to give adequate remedy. A theatre company engages an actor for three months. After the first month the actor signs a contract with some other theatre company. Here the proper remedy would be to restrain the actor from acting in the second theatre. In such a case the court will grant an injunction.

### **Joint rights and liabilities.**

When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death of any of them, his representative jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise. The promise may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise. Each of the two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from

the contract. If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares. Nothing in the above rule, however, shall prevent a surety from recovering from his principal payments made by the surety on behalf of the principal or entitle the principal to recover anything from the surety on account of payments made by the principal.

When two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors, neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivors, or survivor, and, after the death of the last survivor, with the representatives of all jointly. A, in consideration of Rs 5,000 lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representatives jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

An offer to one of several joint promisors has the same legal consequences as an offer to all of them. Thus, a tender of rent by a lessee to one of several joint lessors and of mortgage debt by a mortgagor to one of several mortgagees would be a valid tender.

But one of several joint decree-holders cannot receive payment or give a valid discharge for the whole debt so as to bind his co-decree holders, and this is so, even if two joint decree-holders are partners, unless

the partner receiving payment has been constituted their agent for the purpose of his fellow partners.

### **Quasi contracts or certain relations resembling those created by a contract**

There are certain transactions which give rise to obligations similar to those created by a contract though they are not contracts proper. These transactions are known as *quasi-contracts* and may be enumerated as follows.

(1) If a person, incapable of contracting by law *e. g.* an infant or a lunatic, or any one whom he is legally bound to support, *i. e.* his wife or children, is supplied by another person with necessaries suited to his condition in life, the person supplying such necessaries is entitled to be reimbursed from the property of such person who is incapable of contracting

(2) A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other. A holds his land as a tenant from his Zemindar B. B fails to pay the government revenue for which A's tenancy is going to be annulled by revenue sale. A pays the revenue for B. He can claim the money back from B.

A person purchasing property *subject* to a charge is alone liable to pay it off, and he is not therefore entitled to recover the amount paid by him from the person originally liable in respect thereof. Similarly, a person who buys immovable property subject to a charge for maintenance in favour of a widow cannot recover from the vendor maintenance money paid by him to the widow to save the property from sale at the instance of the widow.

(3) Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensa-

tion to the former in respect of, or to restore, the thing so done or delivered. A, tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

A saves B's property from fire. A is not entitled to compensation from B if the circumstances show that he intended to act gratuitously.

A minor is not liable to a suit under the above rule. This rule does not apply also where an act is done by one person at the *express* request of another. Thus if a client engages a pleader to act for him in a case, and if no fee is fixed, the pleader is entitled to reasonable remuneration not under the above rule, but because the request implies a promise to pay such remuneration.

Where a mortgagee threatened to sell the land mortgaged to him and one of the co-sharers paid up the mortgage debt to prevent the property from being sold, it was held that he was entitled to compensation from the other co-sharers.

The rule does not apply to persons who are incompetent to contract.

(4) A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee, that is, must restore him to the owner.

(5) A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it. A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

This rule does not apply to a mistake of law. Nor does it apply to money paid under compulsion, or even under pressure, of legal process. The money



paid under a decree cannot be recovered back in a fresh suit whilst the decree remains in force. But if the decree is reversed or superseded the amount paid under it is recoverable

S. 86 of the Indian Trusts Act, 1882, provides that where property is transferred in pursuance of a contract which is liable to rescission, or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid

**Obligation of person who has received advantage under void agreement or contract that becomes void.**

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

The above rule applies only to cases where an agreement is discovered to be void, or when a contract becomes void. It does not, therefore, apply to cases where there is a stipulation that, by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the performance of his part of the contract. An insurance company is not, therefore, bound to refund to the heirs of the assured the premiums paid on the policy of life assurance where the assured had committed a breach of the warranty by making an untrue statement as to his age. Similarly, it does not apply to a case where one of the parties such as a minor known at the time so to be—being wholly incompetent to contract, there not only never was but there never could have been any contract. It does apply where a transaction not void but voidable is repudiated by the person entitled to repudiate, as in the case of a sale of Hindu joint family property by the father on behalf of himself and a minor son.

A transferee of property which from its very nature is entitled to recover back his purchase money from the transferor, if the transfer is declared illegal and void.

The above rule does not apply where one of the parties to a contract is incompetent to contract *eg* where one of the parties was a minor, or of unsound mind or a disqualified proprietor whose estate is under the management of the Court of Wards

*Contracts with corporations*—Contracts with a corporation are often required by the Act creating it to be executed in a particular form, as, for instance, under seal. The question in such cases is whether the Act is imperative and not subject to any implied exception when the consideration has been executed in favour of the corporation. If the Act is imperative and the contract is not under seal, the fact that the consideration has been executed on either side does not entitle the party who has performed his part to sue the other on an implied contract for compensation. Thus, section 65 of the Indian Contract Act does not apply to cases where a person agrees to supply goods to, or do some work for, a municipal corporation, and goods are supplied or the work done in pursuance of the contract, but the contract is required by the Act under which the corporation is constituted to be executed in a particular form and it is not so executed. In such cases the corporation cannot be charged at law upon the contract, though the consideration has been executed for the benefit of the corporation.

*Agent*—It is only the person who has received any advantage who is bound to restore. Where on the instructions of a principal an agent entered into a transaction with a third party and paid money to a third party, it was held that the agent did not become liable to restore the money to the principal on the agreement being discovered to be void since it could not be said that the agent had received any advantage.

### **Appropriation of payment**

A debtor may be indebted to the creditor in respect of several sums, *e. g.* A borrows two sums of money, say Rs. 200/— and Rs 400/— at different times A in this case is indebted to B in respect of two sums. In such a case when the debtor pays money to the creditor he may either (i) specifically appropriate or apply the payment to a particular debt or demand, or (ii) pay it generally in respect of his indebtedness

If the debtor wants to apply or appropriate the payment to a particular debt, he must intimate the creditor expressly or impliedly by conduct of his intention to do so *at the time of the payment*. The debtor cannot appropriate after he has made the payment. The creditor is bound by the debtor's appropriation and cannot treat the payment as being made in respect of some other debt or towards indebtedness in general.

Where, however, the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law of limitation

A was indebted to B for £ 100 which was barred by the Statute of Limitation, and £ 150 which was not barred. A paid £ 15 without appropriating it to any particular debt. B sued A for £ 250 on the two debts. A pleaded as to the debt of £ 100 that it was barred and as to the debt of £ 150 a deduction of £ 15 on account of the payment. It was held that as A did not appropriate the payment to the debt of £ 150, B could appropriate it generally on account and thus towards the barred debt of £ 100. Thus B. was held to be entitled to recover the £ 150

## CHAPTER II

### BAILMENT

#### Bailment defined

A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person who delivers the goods is termed the bailor, the person who receives them the bailee. The contract of bailment derives its name from a now obsolete French word, *baillet*, which meant to put into the hands of or to deliver to. Familiar examples of bailments are the delivery of an article to a tradesman or artificer to be repaired or worked on in the way of his trade or craft, and the handing of goods to a carrier for the purpose of being conveyed from one person to another or from one place to another.

A bailment is a contract. Parties to a bailment must be competent to contract. Parties under legal age may avoid contracts of bailment.

#### Delivery to bailee

To constitute a contract of bailment delivery must be made to the bailee. The delivery may be either actual or constructive. A goes to Davicos for his lunch and leaves his hat with the cloak room attendant during the time he is having his lunch. The delivery is *actual*. A comes to book shop and buys a book already in the shop. He then leaves the book in the shop with the shop-owner to send it to his house. Here though A did not actually hand over the book to the shop-owner, yet the shop-owner will be the bailee and A the bailor, because of the

implied contract made by the shop-owner to act as such. Delivery is *constructive* in this case.

The most important thing about delivery is that the bailor must transfer his possession to the bailee. Thus, I can deliver my motor car to a garage as my bailee by simply giving the garage people a delivery order to the warehouse, where my car is stocked. Having regard to the course of dealings with the Railway Company the mere fact that a loading clerk in the employ of the Railway Company filled up a forwarding note and marked a number on it was held not to amount to delivery of goods to the Company. It was further necessary that a number corresponding to the number of the forwarding note should be marked on the goods by a Railway official.

A lady employed a goldsmith for the purpose of melting old jewellery and making new jewels. Every evening she used to receive the half made jewels from the goldsmith and put them into a box which was left in a room in the goldsmith's house, of which she retained the key. It was held that there was a re-delivery of the jewels to the lady and that they were not in the possession of the goldsmith when during the night they were stolen.

### **Different kinds of bailments.**

The legal incidents of bailments may be conveniently considered under three divisions, namely .

1. Bailment which are exclusively for the benefit of the bailor, sometimes termed Voluntary or Gratuitous bailments,
2. Bailments which are exclusively for the benefit of the bailee, and
3. Bailments which are partly for the benefit of the bailor and partly for the benefit of the bailee.

### **Voluntary bailments.**

These most commonly occur when goods are

delivered by one person to another to be taken care of for the bailor without reward or hire, or when goods are to be carried *gratis*. In such a bailment there is no responsibility upon the bailee until he actually receives and accepts the subject matter of the trust. A mere promise by him that he will take charge of or will carry goods cannot be enforced. For instance, if A promises to call at my house and collect goods for the purpose of caring for them or taking them elsewhere, and fails to keep his promise, I have no claim against him. But if my goods are actually delivered to and accepted by him he is under an obligation to use with respect to them while in his custody such a degree of diligence as a man of common prudence would exercise about his own affairs, and he will not be answerable for loss or damage to them unless it be proved that he has been guilty of either a breach of my express orders, gross negligence or fraud. The fact that an article is lost or damaged while in the possession of the bailee, raises a *prima facie* presumption of misconduct against him, but he may rebut it by proving that he was not to blame for the loss or damage, even if he is unable to show how it happened. If, however, the nature of the trust is such as to imply the exercise of skill by the bailee in what he undertakes to do, an omission to use that skill will be accounted against him as gross negligence, and he will be liable to the bailor for the consequences of such omission. A bailee must return the bailed article to the bailor or his nominee on demand, and can be sued for damages for his failure to do so, unless such failure arises from its loss or destruction without any default on his part, such as destruction in a purely accidental fire or owing to some other unforeseen and uncontrollable happening. He is not entitled to make any beneficial use of the article without the consent of the bailor but such consent will be implied if such use is needful for the proper preservation of the article. Thus, if A undertakes to take care of my horse, he can ride and use it so far as may be necessary for keeping the animal in health. A gratuitous bailee can charge the bailor

his actual out-of-pocket expenses in connection with the service he agreed to render, unless there was an express agreement to the contrary. For instance, if A keeps his horse in B's stable and B agrees to this without any remuneration, the horse has to be fed and looked after and A must pay to B all that the latter has to spend for keeping the horse even though B charges no remuneration for himself.

The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which naturally interfere with the use of them, or expose the bailee to extraordinary risks, and if he does not make such disclosure, he is responsible for damage arising to the bailee directly upon such faults. This will, however, hardly arise in this class of bailment as the bailee is not entitled to make any beneficial use of the article without the consent of the bailor.

A gratuitous bailment is terminated by the death either of bailor or of the bailee.

### **Gratuitous loan for use**

The second class of bailment arises where a chattel is lent by its owner to some person for the express purpose of conferring a benefit upon the latter without any tangible advantage to the owner. Examples of this class are lending an umbrella to a friend on wet day and lending a bicycle or motor-car for a special purpose or a definite time. In such bailments the borrower is not responsible for reasonable wear and tear, but, as he alone benefits, he is liable for negligence however slight, and must take the utmost degree of care in the use and preservation of the bailed chattel. He must return the chattel to its owner on demand, or after the agreed time or purpose of the loan has elapsed, or performed. If the bailee incurs any expense in the course of his user, *e.g.*, for shoeing a horse or repairing a motor-car, he must bear such expense. He will not, however, be responsible if the return of the chattel becomes impossible for some reason beyond his

control, or which could not have been reasonably foreseen by him. If the owner of the bailed chattel knows of any defect in it which renders it unfit for the purpose for which it is lent, he must inform the borrower thereof. If he does not, and the borrower is injured by reason of such defect, he can recover damages from the lender. If the borrower allows a third person to use the borrowed chattel without the express consent of the lender, he will be responsible to the lender for any accident that may happen to it while in the hands of such third person.

### **Bailment for reward**

The third class of bailment namely, where both bailor and bailee derive benefit from the transaction, is that most frequently arising in business. The most usual forms of such bailments are contracts for the carriage of goods, which are treated in a subsequent chapter, entrusting goods to agents or factors, contracts for the custody of goods, as when goods are put in a warehouse or furniture is stored in a depository, contracts for the hire of goods or chattels, and contracts for work to be done on goods or chattels, and contracts of pledge or pawn.

The main feature of all bailments for reward, and that which distinguishes them from the other two classes, is that, apart from any special agreement between the parties or from any statutory enlargement of the bailee's responsibility, the bailee is only bound to use ordinary diligence, or, in other words, to do the best he can in the execution of his trust, and consequently he is only liable if he fails to exercise such care as a careful and vigilant man would exercise in the custody of his own goods of a similar character. If he deals with the goods entrusted to him in a way not authorised by the bailor, he takes upon himself the risk of so doing, e.g., if a warehouse man contracts to warehouse certain goods in a particular warehouse, and without the bailor's consent warehouses the goods in another warehouse, and they are destroyed by fire while in such



other warehouse, he will be liable in damages to the bailor, notwithstanding that he had taken all ordinary precautions against fire. A bailee for reward is responsible for the negligence, fraud or intentional wrong doing of his servants or agents if committed within the scope of their employment or authority. In the case of loss or damage to the bailed articles, the onus of proof is on the bailee to show that he used due care and diligence, not upon the bailor to prove negligence.

### Lien.

As a general rule and apart from a special contract, where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has a right to retain such goods until he receives the remuneration for the services he has rendered in respect of them. A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered. But if A gives cloth to B, a tailor, to make into a coat, and B promises A to deliver three months' credit for the price, B is not entitled to retain the coat until he is paid.

Bankers, factors, wharfingers, attorneys of a High court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

A deposits a few shares to get an advance of Rs. 1,000/- from a bank. A repays the advance later on. But it is found that A had previously taken an advance of Rs. 500/- without any security. The bank may retain the shares until A repays the previous advance of Rs. 500/-. In the same way, a solicitor can retain all the papers and documents of client in his hands until he is paid his fees. A railway company

has a lien for its reasonable charges on all goods deposited with it for safe custody, *e g.* at a cloak-room

Goods retained on general lien cannot be sold for the realisation of dues. They can only be retained. Goods retained on particular lien can be sold if there is an agreement to that effect.

### **Goods on hire**

An owner who lets out goods on hire is under a duty to see that they are reasonably fit and suitable for the purpose for which they are to be used, and will be responsible to the hiree for the consequences of any defect, whether the bailor was or was not aware of the existence of such faults in the goods bailed. A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

The obligations of the hirer are to pay the agreed rent or charge, to take reasonable care of the chattel to use it only for the intended purpose, and to return it at the end of the agreed term. He is not responsible for fair wear and tear, and if return becomes impossible because the chattel has perished through some cause for which he was not responsible, he will be excused. For the special law governing hire-purchase contracts, reference should be made to a subsequent chapter.

### **Hire of work and labour.**

A bailment of this class arises under a contract in which one party undertakes to do something to a chattel belonging to the other party, in consideration of a price, to be paid to him *e g.* as when a watch is left with a jeweller, to be cleaned or repaired, a suit of clothes with a tailor to be repaired and pressed, or furniture with a cabinet-maker to be renovated. The obligations of the owner are to pay the workman the agreed price, or, if no price is agreed a reasonable remuneration for his time, skill and labour, and to pay for all materials necessary for the completion of the

work as ordered. The workman is not entitled to charge for extras that were not rendered or assented to by the owner. The obligations of the workman are to exercise due skill and diligence in the performance of the work and to complete it in a workmanlike manner and in the stipulated time, or, if no time was agreed upon, in a reasonable time; to take ordinary care of the chattel as he would do with his own, and to return it in due course to the owner. He will be excused if he can show that loss or damage was not due to any want of care on his part.

A person to whom a chattel is delivered in order that he may do work upon it (not with it) in the course of his trade, or occupation, and who does such work, has a lien on the chattel for the amount of his reasonable and proper charges, and is not bound to return the chattel to its owner until such charges have been paid.

### **Finding articles.**

Many incidents of everyday life may give rise to an implied contract of bailment. If a lost article is found, the finder of the article becomes a gratuitous bailee thereof for the true owner who may demand its return. The finder has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the article and to find out the owner, until he receives such compensation, and, where the owner has offered a specific reward for the return of article lost, the finder may sue for such reward and may retain the article until he receives it.

When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

- (1) When the thing is in danger of perishing or of losing the greater part of its value, or,
- (11) When the lawful charges of the finder, in

respect of the thing found, amount to two thirds of its value.

The person dishonestly misappropriating or converting to his own use any moveable property, is punishable with imprisonment or with fine, or with both, under the Indian Penal Code. A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence, but he is guilty of the offence above defined, if he appropriates it to his own use when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and given notice to the owner and has kept the property for a reasonable time to enable the owner to claim it.

A finds a rupee on the high road, not knowing to whom the rupee belongs. A picks up the rupee. A has not committed any offence.

A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence.

This law does not apply to the case of property of a passenger accidentally left in a railway carriage and found there by a servant of the Company.

If a lost article is found in private premises, it is the duty of the finder to hand the article to the owner or occupier of the premises, who thereupon holds it in trust as a bailee for the true owner, and must take reasonable care of the article. In a case where a customer left a brooch in a shop, which was picked up by an assistant and handed to a shopwalker, who, instead of taking it to the office, put it in an unattended desk from which it was stolen, it was held that the proprietor of the shop was responsible for his servant's negligence, and must pay damages to the

owner of the brooch.. A person who finds a stray dog in the street must forthwith give notice of his find at the nearest police station. If an article is found in a public conveyance it should be handed to the driver or person in charge of the conveyance whose duty it is to hand the article to the police or to his employer.

### **Windfalls.**

If the fruit from a tree growing in my garden drops into my neighbour's garden, I am not entitled to collect it without his permission, and if I trespass in order to do so I am liable for any damage I may do. My neighbour can, if he pleases, let the fruit lie where it fell, but if he takes it up he becomes a bailee thereof for my benefit, and, if he refuses to return the fruit to me on demand I can sue him for its value. The same rule applies to a golf or cricket ball hit on the private property.

### **Bailment of pledges or pawns.**

"Pledge" is defined as a bailment of goods as security for the payment of a debt or performance of a promise. The bailor here is called the "Pawnor" and the bailee is called the "Pawnee".

In ordinary cases the article is actually handed over, as in the case of a man pawning his watch with the pawnbroker. Constructive delivery may take place even where the subject matter remains in the possession of the pawnor. Thus, delivery of the key of a warehouse in which goods are stored, or of the key of room containing furniture, or giving delivery order directing a warehouseman to deliver goods to the pawnee, are sufficient to constitute a bailment of pawn.

It is clear from the definition of "bailment" that there can be no pledge of goods unless there is an actual delivery of the goods. A loan, however, may be secured by a hypothecation of goods. Such a transaction does not require delivery of goods for its validity.

### **Rights of parties.**

The pawnee may retain the goods pledged, not

only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged. But the pawnee cannot, unless there is a contract to the contrary, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged, but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee

The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the goods pledged

If the pawnor makes default in payment of the debt, or performances, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security, or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee must pay over the surplus to the pawnor.

Where the pawnor fails to pay the debt or perform his promise at the stipulated time, he has the right to pay his debt or perform his promise at any time before the sale of the goods pledged and redeem the goods; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

### **Limitation.**

The period of limitation for a suit on the loan is three years from the date of the loan, whether the suit be to recover the original amount of the loan, or to recover the balance after sale of the thing pledged. And if the suit be in respect of a promise, the period is three years from the breach of the promise. And

where the suit is for the sale of the property pledged, the period of limitation is six years from the date of the pledge.

### **Pledge by mercantile agent.**

Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, is as valid as if he were expressly authorised by the owner of the goods to make the same, provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

### **Pledge by person in possession under voidable contract**

When the pawnor has obtained possession of the goods pledged by him under a contract, voidable at the option of the lawful owner on the ground of fraud, misrepresentation or coercion, or on the ground of undue influence, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title

When goods have been obtained by fraud the person who has so obtained may either have no title at all, or a voidable title, according to the nature of the transaction. If the nature of the fraud is such that there never was a contract between the parties, the person who so obtains the goods has no title and can give none. Thus if A represents to B that he is acting as agent for C, and B relying on that representation delivers goods to A as a buyer, there is not a voidable contract between A and B, but no contract at all. No property passes to A, and he can neither make a valid sale nor a valid pledge.

### **Pledge where pawnor has only a limited interest.**

When a person pledges goods in which he has

only a limited interest, the pledge is valid to the extent of that interest

### **Bailor entitled to increases or profit from goods bailed.**

In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, an increase or profit which may have accrued from the goods bailed. For instance, where A leaves a cow in the custody of B to be taken care of and the cow has a calf, B is bound to deliver the calf as well as the cow to A

### **Right of action.**

If a third person wrongfully deprives the bailee of the care or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made, and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury

Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

### **Safety Deposit Companies**

In financial centres a new business has arisen in recent years. Banks and companies especially incorporated for the purpose offer to rent strong boxes and lockers placed in fireproof and burglar-proof vaults to which the lessees have access at all hours fixed for the purpose. Whether the relation of bailor and bailee is thereby created between a lessor and a lessee is still an open question, but the prevailing view in America seems to be that it does create that relationship. While there is no actual delivery of goods to the depositary, the vault and the boxes or lockers contained therein are in the possession and under the general control of the Bank or the Company. The company as well as the



owner of the valuables deposited has a key to the private box or locker of the depositor and the two must cooperate in the unlocking of the box or the locker. In a case reported as *National Safety Deposit Co. v Stead*, the Court said "Where a safety deposit company leases a safety deposit box or safe and the lessee takes possession of the box or safe and places therein his securities or other valuables, the relation of bailee and bailor is created between the parties to the transaction as to such securities or other valuables. The fact that the safe deposit company does not know the character or description of the property does not change that relation any more than the relation of a bailee who should receive a trunk from bailor for safe-keeping would be changed by reason of the fact that the trunk was locked and the key retained by the bailor?"

Reference should also be made to the terms and conditions relating to the particular safe-deposit vault which the depositor signs before the key is handed over to him

### **Warehousemen and Storage Companies.**

A person who keeps a place for the storage of goods for a compensation is a warehouseman or storage-keeper. Most warehouses operate their business as private enterprises. Private warehousemen may select their customers. They are not required to accept goods for storage if they do not so desire.

Warehousemen commonly issue receipts for goods stored with them. These warehouse receipts ordinarily are made payable to the customer's order and may be transferred. They are not generally recognized as negotiable instruments. The purchaser takes the same right to the property which the original bailor had, with the additional right to sue the transferor if the title proves defective.

A warehouseman has a lien on the property for his charges. The warehouseman or storage-keeper must



## CHAPTER III.

# INDEMNITY. GUARANTEE & SURETYSHIP.

### Indemnity and guarantee.

A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity". A contracts to indemnify against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

A "contract of guarantee" on the other hand is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety". the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written. To take an example. A guarantees to B that if he lends Rs. 1,000/- to C, C shall pay the amount within the stipulated time in accordance with his agreement, failing which A shall make good that amount, or in case of an ordinary agreement of sale of goods A guarantees to B that if he gives credit to C in connection with the goods he sells to C for a particular duration, C shall pay the cost of the goods B sells to him, failing which he (A) shall be responsible to make good the amount due either in full or up to certain limit. In both these cases there is a contract of guarantee. A is surety. B the creditor and C the principal debtor.

It is to be observed that in a contract of inde-

mnity the promisor undertakes a primary and not a secondary liability. In consideration of a certain premium Lloyds Insurance Co undertakes to make good any loss which may be caused to A in case the ship or the cargo are lost on the sea, Lloyds Company has the primary liability of covering the loss of A. If A enters into a contract with B, and C, without any communication with B, undertakes for a consideration moving from A, to indemnify A against any damage that may arise from a breach of B's obligation, this will not make C a surety for B, or give him a right of action in his own name against B in the event of B's default. In a contract of guarantee there must always be three parties, namely, the surety, the creditors, and the principal debtor.

The difference is well illustrated by a case reported as *Guild v Conrad*. In that case the defendant requested the plaintiff to accept the bills of exchange of a firm of Demerara merchants and promised that he would, if necessary, meet the bills at maturity, *i.e.* if the firm of Demerara merchants failed to meet the bills, the defendant would meet them. Obviously, the liability of the defendant was secondary and as such the contract was a contract of guarantee. Subsequently, the firm of Demerara merchants fell into difficulties and the defendant asked the plaintiff to accept the bills of exchange drawn by the said firm and promised that he would supply funds in any event to meet the bills at maturity. In the latter contract the defendant apparently undertook the primary liability and the contract was, therefore, a contract of indemnity.

### Consideration for guarantee

Like any other contract, a contract of guarantee or suretyship, must have consideration and may be invalidated by total failure of the consideration, as where the consideration for an intended guarantee was postponing the sale of the debtor's goods, but the creditor was unable to stop the sale for want of the

consent of other necessary parties, or where the consideration was withdrawal of a criminal prosecution against the debtor, but the court would not sanction the withdrawal, the offence being non-compoundable.

Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise. Similarly, if A sells and delivers goods to B and C afterwards requests A to forbear to sue B for a year, and promises that if he does so, C will pay for them in default of payment by B, A agrees to forbear as requested, this is a sufficient consideration for C's promise. But if A sells and delivers goods to B, and C afterwards, without consideration, agrees to pay for them in default of B, the agreement is void.

Lending money or supplying goods to the principal debtor and forbearing to sue him are by far the commonest forms of consideration for a surety's contract. Forbearance to execute a decree against the debtor is also a common form. It is, however, doubtful if the contract of surety is for consideration where a person becomes surety for the payment of the rent due by the lessee after a lease had been executed.

### **Surety's liability.**

The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. The creditor is not bound to exhaust his remedy against the principal before suing surety, and a suit may be maintained against the surety, though the principal has not been sued. A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill, but also for

any interest and charges which may have become due on it

A gives the following promissory note to B

New Delhi, December 2nd, 1946

Thirty days after date I promise to pay to the order of B Five hundred rupees for value received

Signed A,

Signed C, Surety

This note constitutes an obligation of suretyship in which B is creditor, A is principal and C is surety. C's obligation is the same as that of A, his principal. By signing this not as surety, C does not bind himself to pay on condition that A does not or cannot pay the note when due but binds himself to pay the note when due. His obligation is the same as the obligation of A. His obligation is not conditioned upon A's failure or inability to pay.

A guarantees to B the payment of rent becoming due from B to C. B fails to pay the rent. A is liable for the rent, but not for interest on the rent, unless the bond contained some such words as "with interest thereon"

Z writes to A, who holds B's promissory note, that B will pay the principal and interest within three months, "if he does not so pay, I shall have the note assigned to my name and pay you the principal and interest". This is not a special contract of guarantee, but an ordinary contract of suretyship in which terms implied by law are expressed, accordingly both Z and B are liable to A.

A man may make himself a surety, 'with a limit on the amount of his liability, for the whole of a debt exceeding that limit'; and a guarantee of a limited amount for an ascertained debt is presumed to be a guarantee for the whole. But "where the surety has given a continuing guarantee, limited in amount, to secure the floating balance which may from time to time be due from the principal to the creditor, the guarantee is as between the surety and the creditor to be const-

rued, both at law and in equity, as applicable to a part only of the debt co-extensive with the amount of his guarantee. Thus, where A guaranteed Z against trade debts to be contracted by M "as a running balance of account to any amount not exceeding £ 400," and M became indebted to Z for £ 625 and made a composition with his creditors for 8 s 7 d. in the pound, leaving a balance of £ 365 due to Z, it was held that, as between A and Z, A was entitled to deduct from that balance the amount of the dividend paid upon £ 400, the maximum of A's guarantee, and was liable to Z only for the difference.

A's surety is not discharged from liability by the mere fact that the contract between the principal debtor and creditor was voidable at the option of the former and was avoided by the former. And where the original agreement is void, as in the case of minor's contract, the surety is liable as a principal debtor, for in such a case the contract of the so-called surety is not a collateral, but a principal contract.

In the case of an agreement guaranteeing an employer against loss by the misconduct of a person employed as agent of the guarantor, the loss to be recoverable in a suit against the guarantor must be shown to have arisen from misconduct on the part of the agent in connection with the business of the agency, and to be within the scope of the agreement

### **Continuing guarantee.**

A guarantee which extends to a series of transactions which is to be performed by the principal debtor is called a "continuing guarantee" A guarantees payment to B, a tea-dealer, to the amount of £ 100 for any tea he may from time to time supply to C Here the guarantee relates to a series of supplies coming from B to C. B supplies C with tea to the value of £ 100/- and C pays B for it Afterwards B supplies C with tea to the value of £ 200/-. C fails to pay. The guarantee given by A was a continuing guarantee and he is accordingly

liable to B to the extent of £ 100/-

B becomes surety under bond to Government for the treasurer of a Collectorate. The Collector yearly examined the accounts and struck a balance which he certified to be correct. B on each occasion executed a new bond, but the old bonds were not cancelled or given up. On subsequent inquiry, the treasurer was discovered to have embezzled moneys during each year. It was held that, on such discoveries being made, B was still liable under the old bonds, there having been no novation.

A guarantee of the fidelity of a person appointed to a place of trust in a bank is not a continuing guarantee. Nor is a guarantee for the payment by instalments of a sum certain within a definite time.

*Revocation of continuing guarantee.* - A continuing guarantee may be revoked at any time by the surety, as to future transactions, by notice to the creditor. After such revocation the surety is not liable for future transactions, but still remains liable for all transactions completed before his notice of revocation reached the creditor. A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B for twelve months, the due payment of all such bills to the extent of Rs 500/- A revokes the guarantee after three months. But before the revocation B has discounted bills for C to the extent of Rs 2,00/- The revocation discharges A from all future liability to B for any subsequent discount. But A is liable to B for the two thousand rupees on default of C.

*Death of Surety* — The death of a surety puts to an end a continuing guarantee as regards all future transactions unless there is any contract to the contrary.

### **Rights of surety.**

The surety is entitled to proceed against the principal debtor in the same way as the creditor when the surety pays or performs all that he is liable for



upon default of the principal debtor. He is invested in this respect with all the rights of the creditor.

If the principal debtor gives any security to the creditor at the time of the contract, the surety is entitled to the benefit of every such security. If the creditor loses or parts with the security without the consent of the surety, liability of the surety is reduced to the extent of the value of the security C advances to B, his tenant, 2,000/-rupees on the guarantee of A. C has also a further security for the 2,000/- rupees by mortgage of B's furniture C cancels the mortgage. B becomes insolvent and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture. Similarly, where C, a creditor, whose advance to B is secured by a decree, receives also guarantee for that advance from A and C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A withdraws the execution, A is discharged.

#### **Discharge of surety.**

The liability of the surety for the default of the principal debtor is terminated or discharged in any one of the following cases.—

(1) *By variation of the original contract.*—When the principal debtor and the creditor vary in any way the terms of their original contract by a subsequent agreement, the old contract is discharged, and along with it the liability of the surety, as to transactions subsequent to such variation, is also discharged, provided the variance was made by the creditor and the principal debtor without the consent of the surety. C agrees to appoint B as his clerk to sell goods at a yearly salary upon A's becoming surety to C for B's duly accounting for money received by him as such clerk. Afterwards C and B vary the terms of the employment contract without A's consent by stipulating that B should be paid a commission on the goods sold by him instead of a yearly salary. If after this variation B fails

to account for the goods he sold, A will not be liable to C, as C and B have made a variance in the terms of the original contract without A's consent.

(2) *By the discharge or release of the principal debtor* If the liability of the principal debtor is discharged, the liability of the surety is also discharged. The liability of the principal debtor is discharged when either the creditor releases him by a fresh contract, or the creditor does something which amounts to a breach of contract and thus effects a discharge of the principal debtor. A gives a guarantee for B to C for the payment for goods to be supplied by C to B. C supplies goods to B and afterwards B gets into financial difficulties and contracts with C to transfer to him B's property in consideration of C releasing B from his liability to pay for the goods. Here B is released from his debt on account of the goods supplied by C, and A is also discharged from his liability as the surety. Similarly, a breach of contract by the creditor discharges the principal debtor and along with him the surety. A contracts with B to grow crops of indigo on A's land and to deliver it to B at a fixed rate and C guarantees A's performance of the contract. B diverts a stream of water which is necessary for irrigation of A's land, and thereby prevents A from performing the contract. Here B's act amounts to an anticipatory breach of contract as he makes the performance of the contract by A impossible. A will, therefore, be discharged from all liability, and with him C will also be relieved of all liabilities as the surety.

(3) *By the creditor compounding, giving time, or agreeing not to sue the principal debtor* If the creditor comes to terms, or settles with the principal debtor, or if the creditor extends the time during which the principal debtor must pay or perform his contract, or if the creditor agrees with the principal debtor to sue him the surety is discharged and all his liability as the surety is terminated.

(4) *By the creditor's act or omission impairing surety's eventual remedy* If the creditor does an act which interferes with the rights of the surety, or if the creditor does not do some thing which it is his duty to do, with the result that the surety is put to difficulty in enforcing his rights against the principal debtor, the surety is discharged. A puts M as apprentice to B and gives a guarantee to B for M's fidelity. B promises on his part that he will, at least once a month, see M make up the cash. B omits to see this done as promised and M embezzles the cash. A is not liable to B on his guarantee as B did not do what was his duty under the contract, namely, seeing M make up the cash at least once a month.

### **Surety not discharged**

Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged. C, the holder of an overdue bill of exchange drawn by A, as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

As already stated, mere forbearance on the part of the creditor to sue the principal debtor to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety. B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

### **Joint debtors and co-sureties**

Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such a third person may have been aware of its

existence. A and B make joint and several promissory note to C. A makes it in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

Where there are co-sureties, a release by the creditor of one of them does not discharge the other, neither does it free the surety so released from his responsibility to the other sureties

Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor. A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each.

Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit. A, B and C as sureties for D, enter into three several bonds, each in different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees, and B and C 15,000 rupees each.

Where a person gives a guarantee upon a contract that a creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not void if that other person does not join.

### **Implied promise to indemnify surety.**

In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the

principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully. B is indebted to C and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt. On the other hand, A guarantees to C to the extent of 2,000 rupees, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 rupees, but obtains from A payment of the sum of 2,000 rupees in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied

### **Rights of indemnity-holder when sued.**

The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies ;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit ;

(3) all sums which he may have paid under the terms of any compromise of any such suit ; if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

*Bankruptcy of promisee*—B has a claim upon A, but in respect of that claim A has a right to be indemnified by C. A goes bankrupt. A's trustee in

bankruptcy can force C to pay the amount of the claim to him, but the sum received by virtue of the indemnity, must be applied exclusively in paying that debt against which the debtor was entitled to be indemnified.

### **Rights of the promisor**

The rights of a promisor are analogous to the rights of a surety noted on page 77, namely, that a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not, and, if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

### **Invalid guarantees**

Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid. Thus, where a surety guarantees an agent's existing and future liabilities in account with his employer, and the agent is in fact already indebted to the employer for more than the full amount of the guarantee and the statements made about his position are calculated to mislead, though not false in terms, this is evidence of material misrepresentation on the creditor's part.

Any guarantee which the creditor has obtained by means of keeping silence as to material circumstance is invalid. A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

### **Administration and surety bonds**

The liability of sureties under an administration

bond does not depend on the validity or invalidity of the grant. Nor is the bond void merely because administration was obtained by misrepresentations of which neither the court nor the sureties were aware. The same principle applies to surety bonds passed under the Guardian and Wards Act.

### **Contract of a guarantor**

Any one who agrees to answer for the debt, or obligation of another upon condition that the other does not or cannot pay the debt or upon any condition whatever is a guarantor. For example, A gives B the following promissory note :

New Delhi December 2nd, 1946

Sixty days after date, I promise to pay B, or order, one hundred rupees for value received

Signed—A,

The back of the note contains the following statement :

I guarantee the payment of this note when due

Signed—C.

The contract of C is that of a guarantor. If A fails to pay the note when due and B demands payment of A and promptly notifies C of A's failure to pay, C is liable. Technically, C need not be notified, but it is good business practice to give him notice. C's liability depends upon A's failure to pay the note when due. C's liability is a conditional one as distinguished from the liability of a surety which is absolute.

Contracts of guaranty are commonly used in commercial affairs. In obtaining credit contracts of guaranty are common. They may be used apart from promissory notes or negotiable instruments. Any kind of an obligation or contract of another may be guaranteed. A retail merchant desires to purchase 2,000 rupees worth of goods from B, a wholesaler. B does not know A but he does know C, a friend of A. B offers to sell A the goods on credit on condition

that A furnish him a letter of guaranty signed by C. A. furnishes B the following guaranty, signed by C :

New Delhi, December 2nd, 1946

Mr B ,

Bombay.

On condition that you sell A on order of goods which he may select, I hereby guarantee the payment of the amount thereof, not to exceed 2,000 rupees in amount

By this contract, C binds himself to pay B the purchase price of the goods, not exceeding 2,000 rupees, if A fails to pay same

Contracts of guaranty are of many kinds. They are frequently given to secure contracts of personal service, for the construction of buildings, for mercantile transactions, or in fact for any kind of business transaction.



## CHAPTER IV.

### PRINCIPAL AND AGENT

#### **Agency - principal and agent.**

Agency is the term applied to the legal relation existing between persons who transact business or perform duties through representatives. Few duties are performed and few business transactions are completed solely through the personal effort of the interested parties. Most business dealings are completed in part, at least, by representatives or agents. Corporations must act through agents. Individuals as well as the smaller business concerns, perform many of their duties and make many of their contracts through representatives or agents. The law relating to agency next to the law of contracts, is probably the broadest as well as the most important branch of commercial law. Its application is almost universal.

An *agent* is one employed to do any act for another or to represent another in dealings with third persons. The person for whom the agent acts or whom he represents is called the *principal*. The legal relationship existing between the principal and the agent and the principal, agent, and third person, constitutes the *law of agency*. The foundation of the law of agency is the principle that what a person does by another he does himself- *Qui facit per alium facit per se*. A person can do by an agent all that a person wants to do or is compelled to do excepting those that can be performed only personally, as when a painter undertakes to paint a portrait himself.

#### **Capacity to appoint or act as an agent.**

Any person who is of the age of majority accord-

ing to the law to which he is subject and who is of sound mind, may employ an agent. Thus, contracts made by an agent on behalf of an infant or a lunatic will not bind the infant or the lunatic unless they are contracts which would bind the estate of the infant or a lunatic if they were made by himself on his own behalf. Similarly, a person who has a limited capacity to contract cannot make a contract by an agent which he cannot make personally. A company, for instance, can enter into only such contracts as are within the powers granted by its memorandum. If a company makes a contract falling outside these powers by one of its agents, such a contract will not bind the company. The essence of agency proper is that the agent has no rights and duties *under* the contract. He is merely a medium through whom the principal is connected contractually with third persons. As between the principal and third persons, the act of an agent is looked upon as the act of the principal who authorised it. Any person may therefore act as an agent. But a minor or a person of unsound mind cannot be appointed to act as an agent to a principal so as to be personally liable to the principal.

### **Creation of agency.**

No consideration is necessary to create an agency. Where a person agrees to be an agent the contract of agency is created and the relation of principal and agent is constituted between the parties. It is not material whether the offer on the part of the agent is simply gratuitous and without any consideration.

The relation of agency being a contractual relation, it exists, and can only exist, by virtue of the express or implied assent of both the principal and the agent, except in certain cases in which the relation is imposed by operation of law. The relationship of principal and agent may thus be constituted—

(a) by express appointment by the principal, or

by a person duly authorised by the principal to make such appointment;

(b) by implication of law from the conduct or situation of the parties, or from the necessity of the case;

(c) by subsequent ratification by the principal of acts done on his behalf; or

(d) by the principal being estopped from denying the authority of the agent.

*Express authority.*—An authority is express when it is given by words spoken or written. Express appointment of an agent by the principal may thus be made by deed duly drawn up and executed and registered or it may be made in writing only or even verbally. No particular form is necessary.

Where an agent is to act under the provisions of some statute and such statute requires that the appointment of the person so authorized to act must be made in some special form, that form should be strictly adhered to in order to entitle such person to act under it. An instance of this rule is the appointment of a pleader to act for any person in any court, which under the Code of Civil Procedure must be in writing signed by such person or by his recognized agent or by some other person duly authorised by or under a power-of-attorney to make such appointment. Again, every document to be registered under the Indian Registration Act, 1908, whether such registration be compulsory or optional, must be presented for registration either by the executant himself or his representative or assignee, or by the *agent* of such executant, representative or assignee, *duly authorized by a power of attorney* executed and authenticated. Such power of attorney, if the principal resides in any part of British India where the Indian Registration Act, 1908, is in force must be executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides or if the principal

resides in any other part of British India, it must be executed before and authenticated by any Magistrate or the principal does not reside in British India it must be executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of His Majesty, or of the Central Government. Persons who by reason of bodily infirmity are unable to attend without risk of serious inconvenience, who are in jail under civil or criminal process, and who are exempt in law from personal appearance in court, are exempted from personal appearance before the Registrar, Sub-Registrar or Magistrate for this purpose and in this case the Registrar or Magistrate as the case may be, if satisfied that the power-of-attorney has been voluntarily executed by the person purporting to be the principal, may attest the same without requiring personal attendance of the principal. These provisions of the Indian Registration Act are imperative. Consequently, where a registered document purports to have been presented for registration by an agent not holding a power of attorney executed and authenticated as above, the defect is not only a defect of procedure but one that invalidates the registration and makes the deed ineffective.

*Implied authority*—An authority is said to be implied when it is to be inferred from the circumstances of the case, things spoken or written and the usage or ordinary course of dealing are such circumstances from which authority is to be inferred. A has a studio where various customers come to have their photographs taken. A does not manage the studio himself. It is managed by B, who takes orders from customers, purchases chemicals and photographic goods from others and pays for them out of A's funds with A's knowledge. B has an implied authority under such circumstances to enter into contracts on behalf of A in respect of the business of the studio.

The agency constituted by implication rests solely on estoppel. Where any one has so acted as

from his conduct to lead another to believe that he has appointed a particular person as his agent, and knows that other person is about to act in that behalf, then he will be estopped from disputing the agency. It is, however, to be remembered that except in the cases of necessity, no authority results merely from the relationship and a relation like any other stranger requires appointment and authorization to constitute him an agent. For instance, a *son* has no authority as such to lend his father's property and there is no presumption that such authority has been given to a son. It may be shown that authority to act as agent has been given to a son expressly, or the same may be inferred from the conduct of the father tending to show that he reposed *such* confidence and entrusted such discretion to the son as to make the third party to infer that the son acted as the agent of his father. So also, a *parent* as such, whether father or mother, is not *per se* an agent of the child, whether the child be infant or adult. When the child is a minor the parent as such has no greater authority than as a natural guardian. When he is adult he may appoint his parent an agent as he can do in the case of any other person.

The same applies to the relationship of *husband* and *wife*. Neither the husband nor the wife has, by virtue of the marriage alone, any implied power to act as an agent of the other. This power must be conferred expressly or by implication in the same way as in the case of a stranger. Where a husband and wife live together, the mere fact of cohabitation raises a presumption that she has authority to pledge his credit for necessities suitable to the style in which they live; but there is no presumption of authority to borrow money in his name, even for the purpose of purchasing necessities for the price of which he would have been liable if they had been bought on his credit. The presumption of authority arising from co-habitation may be rebutted by proof (a) that she had not in fact authority to pledge his credit; or (b) that she was already

adequately provided with necessities, or that her husband had made her a sufficient or agreed allowance therefor.

The liability of a husband for his wife's debts depends on the principles of agency, and he can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done

Where a wife, who is living with her husband, has the management of the household, she is his general agent in all household matters, and has implied authority to pledge his credit for all such things as are necessary in the ordinary course of such management, and are usually bought on credit. Every act done by a wife within the scope of her implied authority as manager of his household binds the husband, unless she has in fact no authority to do the particular act, and the person dealing with her has, at the time of the transaction, notice that she is exceeding her actual authority. The implied authority of a wife as housekeeper is confined to domestic necessities suitable to the style in which the husband lives, and it does not extend to articles of luxury.

Under the English law where husband and wife are separated by mutual consent, and there is an agreement between them as to her maintenance, she has no implied authority to pledge his credit so long as he duly complies with the terms of the agreement, whether she is adequately provided for or not, but if the terms of the agreement be not duly complied with by the husband then she has implied authority to pledge his credit for necessities suitable to her station in life. And where husband and wife are separated by mutual consent, and there is no agreement between them as to her maintenance she has implied authority to pledge his credit for necessities suitable to her station in life, unless she has adequate separate means, or is provided with an adequate allowance, either by her husband or some other person. Where the wife is



not have authority to do but for the necessity.

Second, a case in which it is alleged that a mere stranger acting for the principal without any authority or without any authority being subsequently conferred on him by ratification, becomes an agent, under circumstances of positive necessity such as when irreparable injury to property by fire or some other calamity would arise but for his interference. Under such circumstances it is said that a mere stranger becomes an agent of necessity of the principal, and can make the principal liable by his acts. Thus, a railway company is entitled to send a horse to a livery stable keeper whose owner does not meet it at the station, and the railway company has no safe accommodation for the horse. An example of the first is that of a carrier where goods are in his possession and it becomes necessary to provide for their safety or preservation, or, where the goods are perishable, to sell them in the best interest of the owner.

*Agency by ratification*—Ratification is the adoption as his own by a principal of an unauthorized act or contract of an agent or of an entire stranger. As a rule, a principal cannot be made liable at all for the acts of a stranger not purporting to be done as his agent. But where an act is done in his name or professedly on his behalf without his authority by another person assuming to act as his agent, he may adopt or confirm such act as if done by himself or with his authority. The act then becomes as valid and effectual as if had been originally done by his duly authorised agent, whether the person doing such act was an agent exceeding his authority or was a person having no authority to act for him at all.

Ratification may be done either by words spoken or written or by implied conduct. A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

No valid ratification can be made by a person



whose knowledge of the facts of the case is materially defective. If the principal can show that he did not possess full knowledge of all the facts when he ratified, he will not be bound by the ratification

No person can satisfy the acts of another which were done on his behalf, but without his authority, and the effect of which is to deprive some third person of his property rights or to subject such third person to damages. A holds a lease from B terminable on three months' notice. C an unauthorised person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

### **Agency by estoppel.**

Agency by estoppel, as we have already noticed, rests on the principle that when any person, by words or conduct, represents or permits it to be represented that another person is his agent, he will not be permitted to deny the agency with respect to any third person, dealing on the faith of any such representation with the person so held out as an agent, even if no agency exists in fact. Where A, by words or acts, or by silence or inaction (if there is duty on him to speak or act), represents to B, or to the public or a class of which B is a member, that X is his (A's agent), or has his authority either generally, or for the purposes of a particular transaction or type of business, and B, is induced by such representation to alter his position for the worse, A is estopped from afterwards disputing, as against B, that X was invested with such agency or authority at the time at which he was so described. The principle underlying this is that a man is not permitted to resist an inference which a reasonable person would necessarily draw from his words or conduct.

Where the plaintiff entrusted his luggage with a porter wearing the uniform of the defendant Railway Co., and the luggage was stolen and the Railway Co. wanted to avoid liability for the loss on the ground that the porter was off duty, it was held that the por-

ter was held out by the Company as an agent authorised to receive luggages, and as such the Company was bound by his acts.

Agency by estoppel arises in three ways :—

(1) A person may hold out another as his agent although that other is not or has never been his agent.

(2) A person may hold out his agent as having a wider authority than he was given authority for. Thus, where the manager of a public house had only the authority to buy mineral water and bottled beers, but the manager bought some cigars though he had no authority to do so, the owners of the public house were held liable for the cigars as they, by their conduct, held out manager to conduct everything connected with the public house.

(3) A person may hold out another as his agent although that other has ceased to be so A's agent H used to sell tallow in the form "Sold for A" After some time H ceased to be A's agent But A did not notify that to his customers So when H contracted to sell tallow to the plaintiff, A was held liable for the contract.

### **Extent of agent's authority**

An agent may be appointed (a) to act for his principal in all matters, or in all matters concerning a particular trade or business, or of a particular nature, or (b) to do some act in the ordinary course of his trade, profession or business as an agent, on behalf of his principal. Such an agent is called a *general agent* Examples are a solicitor, factor or broker. An agent may have authority only to do some particular act, or represent his principal in some particular transaction, such act or transaction not being in the ordinary course of his trade, profession, or business as an agent. Such an agent is called a *special agent*.

Whether the agent is a special or general agent, he is deemed in law to do every lawful thing which is

necessary in order to do such particular acts or all acts of some general kind as he may be entrusted with. An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose or usually done in the course of conducting such business. A is employed by B, residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt and may give a valid discharge for the same. Similarly, A constitutes B his agent to carry on his business of a ship-builder. B may purchase timber and other materials and hire workmen for the purpose of carrying on the business.

#### **Authority of agent by necessity or urgency.**

An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances. A consigns provisions to B at Calcutta, with directions to send them immediately to C at Cuttack. B may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

It is, however, the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

#### **Agent's duty to principal.**

An agent has the following duties towards his principal :

(a) An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

A, an agent engaged in carrying on for B a business in which it is the custom to invest from time to time at interest the moneys which may be in hand, omits to make such investment. A must make good to B the interest usually obtained by such investments.

B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

(b) An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses, and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

A, a merchant in Calcutta, has an agent, B, in London to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as *e. g.* by variation of rate of exchange but not further.

(c) It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions. If he can obtain such instructions but fails to do so or disobeys the instructions obtained in time to meet such situation and acts on his own initiative, he is liable to the principal for any loss caused thereby in the first case, and in the second case also he is liable to the principal for any loss which may

result to him therefrom in the same way and to the same extent as he would have been if these instructions had constituted part of his authority as original directions

(d) It is agent's duty not to deal in the business of the agency on his own account. If an agent does so, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

A directs B to sell A's estate. B on looking over the estate before selling it, finds a mine in the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy, in ignorance of the existence of the mine. A on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

(e) If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

A broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he thinks proper.

(f) An agent must not use material or information acquired in course of agency. This, however, does not apply to the experience, skill and training which the agent acquires in the ordinary course of his agency

(g) Subject to such deductions as an agent is allowed to make in respect of advances made or expenses properly incurred in conducting the business of the agency and in respect of any remuneration to which he may be entitled for the work done as agent, every agent is bound to pay to his principal all sums received on his account

No interest is payable by an agent in respect of money received by him on his principal's behalf, except under some contract express or implied, or where there has been some default on his part, such as a dealing with the money in breach of duty, or a failure to pay it over at the principal's request, in which cases interest is payable from the date of the default. The agent must also pay interest in all cases of fraud, and on all bribes and secret profits received by him during his agency, or when he has himself realized interest on the amount due from him by investment or by use in his own business

(h) An agent is bound to render proper accounts to his principal on demand. It is also agent's duty to keep principal's property separate, and to preserve correct accounts. The agent's duty to keep and render proper accounts involves the right of the principal to assure himself that the accounts are proper and correct. It is therefore the duty of an agent to produce to the principal, or to a proper person appointed by the principal, all books and documents in his hands relating to the principal's affairs

It is also a duty of an agent not to deny the principal's title to the property entrusted to him as agent.

### **Principal's duty to agent**

A principal has the following duties towards his

agent:

(a) A principal is bound to compensate or indemnify his agent against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him. B at Singapore, under instructions from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorises him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incur expenses. A is liable to B for such damages, costs and expenses.

(b) Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons. B, at the request of S, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B, and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay C, and for B's own expenses.

(c) A principal is not bound to indemnify his agent for the consequences of any criminal act which the agent does at the request of the principal. The reason is that no one can protect himself from criminal liability by pleading that he was merely an agent. A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.

(d) The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill. A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and

B is in consequence hurt A must make compensation to B

(e) *Agent's remuneration* — The right of an agent to be remunerated for his services, is founded upon an express or implied contract between the principal and agent Where it is so founded, the principal must pay the remuneration, commission or other dues due to the agent. In the absence of any contract to the contrary, payment for the performance of any act is not due to the agent until the completion of such act, but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete. But in the absence of any contract to the contrary, an agent is entitled to retain goods, paper and other property, whether movable or immoveable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him

### **Duties and liabilities of principal to third person.**

When a person employs another to act for him, he is liable to third persons for the acts performed by the agent so long as the agent acts within his authority. If A appoints B his agent to purchase live stock, A must pay third persons for the live stock purchased in his name by B

Contracts entered into through an agent, and obligations arising from acts done by agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person A buys goods from B, knowing that he is an agent, for their sale, but not knowing who is the principal B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set off against that claim a debt due to himself from B. Again, A being B's agent, with authority to



receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

A person employing another to act as his agent is responsible to third persons for acts performed by the agent which are within the apparent authority of the agent as well as for the acts which are within the actual authority. Where injury or loss is caused to a third person by the wrongful act or omission of an agent who is acting within the scope of his authority, the principal is liable jointly and severally with the agent. A principal is liable to third persons for his agent's torts or wrongful acts. If A directs his agent B to destroy C's property, A is liable to C for the damage done. A principal is not only liable to third persons for the damages done under his express direction by his agent but he is also liable for the acts carelessly done by the agent in the course of his employment. A street car company employs B as motor man. B, carelessly and negligently, while operating a car runs over C. A is liable for B's negligent act. A principal, however, is not liable for the wrongful acts of his agent, performed outside of his employment. A, a street car company, employs B as conductor. C, standing on the street insults B. A stops his car, gets off and assaults and injures C. B is not liable, since B did not commit the act complained of while in the course of his employment but went outside the course of his employment and acted on his own behalf.

Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals, but misrepresentations made, or frauds committed by agents, in matters which do not fall within their authority, do not affect their principals. Thus, where A being B's agent for the sale of goods, induced C to buy

them by a misrepresentation, which he was not authorised by B to make, the contract is voidable as between B and C at the option of C

It has been held under the English law that there is no remedy against the Crown by petition of right or otherwise, for any wrongful act or omission of a public agent

*Notice given to an agent* — Notice of any fact given to an agent is deemed to be notice given to the principal provided such agent has got authority to receive such notice or in the usual course of business or by custom such agent receives such notice. An agent receiving such notice must also receive it in course of his duty as an agent in order that the notice may operate as a notice to his principal. A draws a *hundi* on his Bombay office in favour of the firm of B & Co. B & Co. informs the cashier of A's office in Bombay that the *hundi* has been stolen. The cashier does not inform the office and when he is away on leave the stolen *hundi* is presented and cashed. A is bound to pay B & Co. over again, as the notice of the theft communicated to his cashier is notice to himself, since the cashier is deemed capable of receiving such notice. But if in the above case the durwan of A's office was told of theft, A would not have been bound by the notice, for the durwan is neither authorised nor is it usual in the normal course of business for him to receive such notice. Also if the cashier knew of the theft from some one not connected with B & Co. or in course of his private dealings unconnected with his duty as a cashier, A would not have been bound by such notice. The same rule applies to information obtained by the agent.

*Agent exceeding his authority* — when an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 rupees on the ship B procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy of the cargo.

But where what the agent does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction. A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 rupees. A may repudiate the whole transaction.

Where an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third person to believe that such acts and obligations were within the scope of the agent's authority. A consigns goods to B for sale, and gives him instructions not to sell under a fixed price C being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract. Similarly, where A entrusts B with negotiable instruments endorsed in blank and B sells them to C in violation of private orders from A, the sale is good.

No act done by an agent in excess of his actual authority is binding on the principal with respect to persons having notice that in doing the act the agent is exceeding his authority. Where the regulations of a company are registered, persons dealing with the directors and other agents of the company are for this purpose deemed to have notice of such regulations.

#### **Agent's right to act as principal.**

In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. Such a contract, however, shall be presumed to exist in the following cases,—

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(2) Where the agent does not disclose the name of his principal;

(3) Where the principal, though disclosed, cannot be sued.

An agent who signs a contract in his own name without qualification, though known to be an agent is understood to contract personally, unless a contrary intention plainly appears from the body of the instrument, and the mere description of him as agent, whether as part of the signature or in the body of the contract, is not sufficient indication of a contrary intention to discharge him from the liability incurred by reason of the unqualified signature. On the other hand, if words are added to the signature indicating that he signs "as an agent", or on account or behalf of the principal, he is considered not to contract personally, unless it plainly appears from the body of the contract, notwithstanding the qualified signature, that he intended to make himself a party.

Although a person might be a member of an undivided Hindu family, still if a contract is entered into with him in his individual capacity and there is nothing on the face of it to show that he was acting on behalf of the family, he is entitled to sue alone. But where a contract is entered into on behalf of joint family business by the managing members of the firm in their own names it is not necessary that any members of the joint family, other than those who entered into the contract should be made plaintiffs in a suit brought thereon: the managing members are in the position of agents for undisclosed principal. On the same principle, one of two partners with whom a contract has been personally made may sue to recover money due to the firm on accounts.

When an agent has made a contract in the sub-

ject-matter of which he has a special property he may, even though he contracted for an avowed principal, sue in his own name. Such is the case of a factor, and of an auctioneer, who "has a possession coupled with an interest in goods which he is employed to sell, not a bare custody, like a servant of a shopman" and a special property by reason of his lien.

### Undisclosed principal.

A principal, whose agent deals with a third person for his benefit without disclosing the name of his principal or perhaps without disclosing the fact of agency, is said to be *undisclosed principal*. For example, A employs B to purchase one hundred crates of oranges. B purchases the oranges from C for A in his own name, not telling C that the purchase is made for A. In this case, A is an undisclosed principal.

If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal. B contracts to buy some cotton from C, a cotton dealer. B is really contracting for A, his principal, but C does not know, nor has he any reason to suspect that B is A's agent. In this case B can obviously sue C if he refuses to sell the cotton, and C can also sue B if he refuses to buy the cotton. A can also sue C or be sued by C. As a principal he can always require the performance of the contract by the other party, and the other party can similarly make him liable under the contract.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance *subject* to the rights and obligations subsisting between the agent and the other party to the contract. A, who owes 500 rupees to B, sells 1,000 rupees worth of rice to B. A is acting as agent for C in the transaction but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set off A's debt.

### **Right of person dealing with agent personally liable**

A reference has already been made to the cases where an agent is personally liable. In such cases, a person dealing with him may hold either him or his principal, or both of them, liable. A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

### **Pretended agent**

If a person falsely represents himself to be the agent of another and thereby induces a third person to enter into a contract with him as agent, such a pretended agent is liable to make good any loss which such other person incurs as a result of entering into the contract. The pretended agent will, however, be exonerated from the liability if his alleged principal ratifies the contract subsequently.

### **Person falsely contracting as agent.**

A person with whom a contract has been entered

into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

### **Apparent authority of agent.**

While it is true that an agent must have authority from his principal before he can bind his principal in the capacity of agent and while it is equally true that third persons, in dealing with agents, must determine at their peril that the agent has actually received authority to act for his principal, a third party has the right to rely upon the implied and customary powers accompanying an actual authority conferred upon an agent. Few contracts are made express in all their terms. Language is not susceptible of such nicety. In the express or implied contracts used in creating agencies, many things are implied. A third party dealing with an agent is not limited, by the actual authority conferred upon the agent by his principal, if the character of the authority *apparently* confers other customary or implied powers.

Apparent authority should be distinguished from authority by estoppel, inasmuch as apparent authority is that which, though not really granted, the principal *knowingly* permits the agent to exercise, or holds him out as possessing, while agency or authority by estoppel arises in those cases where the principal by his conduct or culpable negligence permits the agent to exercise powers not granted to him even though the principal may have no notice or knowledge of the conduct of the agent.

Again, apparent authority should also be distinguished from the express or declared authority, inasmuch as the apparent authority forms the basis of contract between the agent and third parties, who need not look to and generally have no chance to look to the express or declared authority, while an express or declared authority forms the basis of dealings, between the principal and the agent both of whom are privy to it.

The apparent authority is the character in which the agent appears before the public. It may or may not be the same as the character actually given to him by the principal. Where it is different, it being the only guiding factor for the public, is even more important than the declared authority itself and always over-rides it so far as the third persons are concerned. For example, an agent has authority to sell silk goods and to make exchanges in silk. This authority is printed on the order sheets furnished to the agent. The agent exhibits these orders to the customer and exchanges are made. The principal cannot claim that the agent had authority to exchange only goods of the principal's manufacture. The authority conferred upon the agent to make exchanges apparently was to make exchanges of any silk. The principal cannot complain if third parties rely upon the apparent authority.

### **Secret instructions**

So long as the agency is legal, a principal may create an agency of as limited an extent or of as broad a nature as he desires. So long as the limitations which the principal places upon his agent's authority are not of a nature to mislead third persons, the agent cannot bind his principal by exceeding these limitations. But if a principal confers an authority upon an agent which impliedly embraces a number of powers, the principal cannot limit these powers by secret instructions.

The limitations upon an agent's apparent authority must be brought to the attention of the third party. For example, A, a wholesale dealer, may employ B, a salesman, to take written orders only. If B attempts to take oral orders, the principal, A, will not be bound thereby. But if A gives B authority to take written orders only and secretly instructs B to take no order less than hundred rupees in amount, or in excess of one thousand rupees, and B takes C's order for eighty rupees, C not knowing of this limitation, A is bound. If, however, A instructs B to take only written orders and in amounts



ranging only from one hundred rupees to one thousand rupees and prints these conditions plainly upon the order blank, C, in signing one of these order blanks for eighty rupees does not bind A. In this case, A has placed the limitation of B's authority in C's possession.

### Termination of agency

An agency is terminated by the principal revoking his authority, or by the agent renouncing the business of the agency, or by the business of the agency being completed, or by either the principal or agent dying or becoming of unsound mind, or by the principal being adjudicated an insolvent

*Revocation of agent's authority or renunciation by agent*— Where the agent has himself an interest in the property which forms the subject matter of the agency, the agency *cannot*, in the absence of an express contract, be terminated to the prejudice of such interest. Subject to this rule, the principal may revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal. A gives authority to B to sell A's land so that B can take out of the proceeds the debts due to him from A. A cannot revoke his authority, nor can it be terminated by death or insanity, as B has an interest in the property as creditor.

The principal *cannot* revoke the authority given to his agent after the authority has been partly exercised by the agent in such a way that he has incurred personal liability and the revocation will expose him to loss or injury. A authorises B to buy 1,000 bales of cotton on account of A and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name so as to make him personally liable for the price. A cannot revoke B's authority, so far as regards payment for the cotton. If, however, in the above case, B buys the cotton in A's name so as not to make himself personally liable, A can revoke B's authority to pay for the cotton.

The agent can also terminate the agency by *renunciation* i.e. by giving notice to the principal of his unwillingness to act as agent

Where the agency is fixed by contract to continue for a specified time, either the principal or the agent can previously terminate the agency by revocation in one case and renunciation in the other for a just cause, the principal must make compensation to the agent if he revokes, and the agent must make compensation to the principal if he renounces, before the specified period

Whether the principal revokes or the agent renounces, reasonable notice must be given by the one to the other, otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other

Revocation and renunciation may be either expressed in words or writing or may be implied in the conduct of the principal or the agent respectively. A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

Where an agent's authority is revoked, the revocation does not affect the rights and liabilities of the agent in relation to the principal until the agent is actually informed of the revocation and the revocation does not affect the rights and liabilities of the general public with whom the agent deals, in relation to the principal unless the notice of revocation reaches the public. A directs B to sell goods for him, and agrees to give B 5 per cent commission on the price fetched by the goods. A afterwards, by letter revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for Rs. 100/-. The sale is binding on A and B is entitled to five rupees as his commission. But if C, a member of the public, knows that B has authority to sell A's goods but does not know of A's letter by which A revoked B's authority and buys the goods from B for Rs. 100/- and B bolts with the money, his payment to B is good, as he was not

informed of A's letter of revocation, and he can keep the goods.

A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

*Termination of agency by performance*—The agency is terminated by performance when the agent has done what he was employed to do, after which he is *functus officio*. Thus, a broker who has been employed to sell, after the sale has no power to alter the terms of the sale, for he ceases to be agent, or rescind it. Similarly, if A employs B to sell his house or to manage his business for six months, B's agency will terminate after B has sold the house or managed the business for six months.

*Termination of agency by operation of law*—The relation between an agent and the principal is entirely personal. Therefore, except where the authority is irrevocable by the act of the principal during his life time, namely, where it is coupled with an interest in or an obligation as regards the property which forms the subject matter of agency, it always comes to an end instantly on the death or incapacity like insanity of either. But the act of an agent done in good faith in ignorance of the death of the principal is binding upon his representatives.

When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted him.

*Termination of agency by insolvency of the principal*—When a person is adjudged insolvent all his property of whatever kind becomes vested in the receiver or official assignee and he becomes incapable of entering into a contract in respect thereof. The insolvency of the principal operates as a revocation of the authority of his agent touch-

ing any right or property of which he is divested thereby. The insolvent thereby ceases to be the owner and is consequently incapable of passing any title to it, and the act of his agent cannot have higher validity

Although adjudication of the agent as insolvent does not itself operate as a legal cause of termination of authority yet it may give the principal, in cases of business agents, where credit plays an important part and is generally a consideration for his engagement as agent, a sufficient excuse for withdrawing his authority.

*Other causes of termination of agency*--Agency may also be terminated by efflux of time, that is, where the relation of principal and agent is agreed to exist only for a particular period, the expiration of such period would operate to terminate the agency. Agency may also be terminated by destruction or extinguishment of the subject matter, for instance, the destruction of a house by fire terminates an authority to sell it. Likewise, an agency may be terminated by the happening of any event which renders the agency unlawful, for example, by change of law rendering the object of agency unlawful, or war between the nations of the principal and agent, or in certain cases, marriage of the principal or agent

### **Agency coupled with an interest**

A reference has already been made to an agency coupled with an interest. If the agent has an interest in the subject of the agency outside his interest in his compensation, he is said to have an agency coupled with an interest. Such an agency is irrevocable, nor is it terminated by death, insanity or insolvency of the principal or agent. The purpose of this agency is to create an irrevocable interest in the subject matter of the agency so that the benefits of the agency continue with the agent after the principal's death. This form of agency must be expressly created by act of the principal.

A pays B ten thousand rupees for one-eighth interest in a patent and in consideration of this pur-

chase is given the agency to sell the patented article for a fixed commission. This constitutes an agency coupled with an interest and is not revoked by an attempted revocation of the principal or by the principal's death. A is indebted to B, his attorney, for one thousand rupees. A gives B a note for two thousand rupees to collect, agreeing to pay him ten per cent of the amount collected, and to permit him to deduct the one thousand rupees indebtedness. This constitutes an agency coupled with an interest and cannot be revoked by A.

To constitute an agency coupled with an interest, the interest must be coupled with the subject matter of the agency and not merely with the compensation the agent is to receive. For example, if A sends his attorney B a note to collect, agreeing to give B 25 per cent of the amount collected, this does not constitute an agency coupled with an interest and may be revoked at any time by A.

### Sub-agents.

The general rule of law is that an agent cannot appoint another person to do his duties which he owes to his principal—*delegatus non potest delegare*—a delegate cannot delegate. But in some cases an agent can appoint a sub-agent to do his duties where it is usual according to the mode of business and custom. Where personal judgment and discretion are required of an agent, he cannot transfer his duties to another without the consent of his principal. A, a wholesale goods merchant, employs B, an experienced travelling salesman, to sell goods. B, by his contract, is bound to give his personal skill to A and cannot employ C to act as salesman for him. A presumptively employs B to use his own skill and judgment. B is not permitted to delegate his authority to another.

Where, however, mere mechanical or ministerial work is to be performed, the agent is permitted to employ others to assist him or to perform the work. For example, A employs B, an expressman, to carry his

trunk to the depot B may employ a boy to assist him in performing the work or may employ another to perform the work. Similarly, where A employs B to act as stenographer in reporting the trial of a case, when it comes to writing out the testimony, B may perform the task himself or delegate it to another.

*Relations between principal and sub-agent*—A 'sub-agent' is a person employed by, and acting under the control of, the original agent in the business of the agency. Where a sub-agent has been properly appointed, *i. e.* where such appointment is usual, the sub-agent is only responsible to the agent and not to the principal except in case of fraud or wilful wrong. The agent, however, is responsible to the principal for the sub-agent.

*Liability to the public for the act of sub-agent*—Where an agent has express or implied authority to appoint a sub-agent and a sub-agent has been properly appointed, the principal is liable for all the acts of the sub-agent in relation to third parties, as if he was an agent originally appointed by the principal. But where an agent improperly appoints a sub-agent *i. e.*, where he has no express or implied authority, or where it is not usual to appoint a sub-agent, the agent is liable for all the acts of the sub-agent both to the principal and third parties. The principal is not bound by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

It is to be noted that an agent cannot only appoint a sub-agent where it is usual, he can also have authority, express or implied, to nominate or select another person to act as agent for the principal. Where a person has been so nominated by an agent, he becomes *not a sub-agent but an agent* of the principal, and he is related to the principal in the same way as the agent nominating or selecting him. A directs B his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer

to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

It is also to be noted that in selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this he is not responsible to the principal for the acts or negligence of the agent so selected. A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

### **Joint-Principals and Joint-Agents**

Where there are two or more principals having a distinct interest, the general rule is that no one or more of them can ordinarily appoint an agent for the others without the consent of all, and this statement might be extended by saying that no one of them can without being given authority appoint an agent for any of the others. To make persons joint principals they must agree to appoint either one of themselves or an outsider their agent.

But whatever a man may do of his own right and on his own behalf he may do by agent, and therefore if one or more of several joint principals may of his own right act on behalf of the other principal, he may appoint an agent on their joint behalf. Where the interest of all the principals is common, and each is authorised to act for all, either may ordinarily appoint an agent whose acts will be the acts of all, but in those cases where the interest of each is several, and in those cases where the subject matter of agency can only be attained by the united act of all, neither can bind the other by the appointment of an agent.

As regards *joint agents*, the view previously held was that where an authority is given to two or more

persons to do an act, the act is valid to bind the principal only when all of them concur in doing it, for the authority is construed strictly, and the power is understood to be joint and not several. In modern times, strictness has been relaxed, and the courts now will search the power to find the maker's intention.

Where any of the joint agents dies the authority does not survive to the survivors, except when the authority is given for public purposes.

### **Mercantile agents**

When commercial transactions embrace a more extended and larger sphere of operations, the clerical staff and assistants of the business are insufficient to cope with the work involved, so that it is usual to appoint agents such as brokers, commission agents, shipping agents, warehousemen, forwarding agents etc.

A 'mercantile agent' means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods or to raise money on the security of goods. The term does not include a mere servant or caretaker, or, one who has possession of goods for carriage, safe custody or otherwise, as an independent contracting party. The following are the chief classes of mercantile agents.

*Factors* — A factor is a mercantile agent whose ordinary business is to sell goods with the possession or control of which he is entrusted by the principal. Hence a factor has implied authority —

- (1) To sell in his own name
- (2) To sell at such time and prices as he thinks best for the principal
- (3) To sell upon the usual terms of credit
- (4) To receive payment of the price and give a good discharge to the buyer.

Any private instructions restrictive of the appa-



- rent authority due to his character of factor do not affect his ordinary transactions unless they are unsatisfactory to the other contracting party. Where a mercantile agent, including a factor, is in possession of goods or documents of title, any sale, pledge, or other disposition of goods made by him when acting in the ordinary course of business will be as valid as if he were expressly authorised by the owner to make the same, providing he acts in good faith

A factor may sue the purchaser in his own name for the purchase price. The principal may sue in his own name also. Persons dealing with factors may hold the principal responsible for the contracts and representations of the factor the same as any undisclosed principal. Factors are also personally liable to third persons for their contracts.

A factor must account to his principal for money collected, less his commission and expenses. He is not obliged to keep such money separate from his own, but he must keep accurate account of same, and remit promptly when it is due, according to custom or special contract.

*Brokers*—A broker is an agent whose ordinary course of business is to negotiate and make contracts for the sale or purchase of goods. Hence a broker is primarily an agent to establish privity of contract between two parties, e.g. an intending seller and an intending buyer of goods. Where a broker is acting as an agent for sale, he differs from a factor in that—

(1) A factor is entrusted with the possession of the goods he is employed to sell, whereas a broker is not

(2) A factor has authority to act in his own name and to sue in his own name on the contract made by him whereas the broker has no such authority

(3) A factor has authority to receive payments and to give a good discharge to the buyer for goods

'sold by him, whereas the broker has not

(4) A factor has a lien on goods in his possession whereas a broker in ordinary cases has not. But there are two exceptions—

A. *Insurance Brokers* have a lien on all policies of insurance effected by them in their own names and for all premiums paid or payable by them to the underwriters with whom the policies are effected

B. *Stock Brokers* have a lien on all moneys and securities of their customers which have come into their hands in the ordinary course of business for whatever balance may be due to them

When a broker makes a contract he puts the terms of the contract into writing and delivers to each party a copy signed by him. The copy delivered to the seller is called the '*sold note*' and the copy delivered to the buyer is called the '*bought note*'

*Commission agents*—A commission agent is a person employed, not to establish privity of contract between the employer and the third party, but to buy or sell goods for the employer on the best possible terms, receiving a commission for his exertions, e.g. where X, a merchant in Calcutta, agrees with Y, a commission agent in Manchester, that Y shall endeavour to procure a certain amount of calico, and when procured sell it to X, receiving not only the price at which the calico was brought, but a commission at, say, 5 per cent on the price as a reward for his exertions in procuring the calico. The duty of a commission agent who is employed to buy goods for a principal is twofold:

(1) To procure the goods required by his principal as cheaply as possible

(11) To charge the principal with the actual cost of the goods and the commission agreed upon and nothing more.

Hence if he charges his principal either directly

or indirectly a higher price than he has himself paid for the goods it is a fraud on his principal and the principal can compel him to account for all secret profits made by him in connection with the transaction.

The commission agent engaged in the foreign trade acts in his own name, but for the account of either the foreign buyer or importer or on behalf of the home manufacturer. He must have a special knowledge of the goods in which he deals; and must keep in close touch with the movements of their prices and with any alterations which take place in the process of their production. The primary object of the commission agent is to obtain orders from foreign buyers and then to pass them on in his own name to the home manufacturers. Moreover he has to supervise the execution of these orders and bring them to a satisfactory conclusion. In his dealings with the manufacturer, the commission agent acts in the interests of his principal, and insists on the goods being made according to sample, and on the delivery being effected by the date arranged. He also undertakes the work connected with the dispatch of the goods, such as the arrangements with the shipowner, the preparation of the bills of lading, the procuring of the customs documents and the effecting of the insurance.

A *Del Credere Agent* is employed to sell the goods of his principal and, in consideration of a higher remuneration than is usually paid to agents, gives an undertaking to his principal that the parties with whom he is brought into contractual relations will perform the engagement into which they enter. In some trades a *del credere* commission is annexed to the employment of the agent by the usage of the trade, and therefore the contract need not be in writing.

*Forwarding agents* — are persons employed to collect and deliver goods on behalf of others.

The merchant usually utilises the services of the forwarding agent in the dispatch of his goods. This is

necessary especially in the consignment of goods across the sea, as the shipping companies do not hold themselves responsible for the conveyance of goods from the railway to the quay. The forwarding agent is also indispensable to the home trader who is in receipt of his supplies from abroad. It is his duty to be at the port of importation to receive delivery of the goods and to examine their quantity and quality, and to attend to either their warehousing or their onward transmission.

Apart from these circumstances, it is almost always advantageous to the merchant to engage the services of the forwarding agent, because—

(1) The forwarding agent can forward separate parcels cheaper than the railway. He collects the various packages addressed to the same town or district from the different consignors into one consignment, and is thus enabled to avail himself of lower rates.

(2) Special privileges are usually granted by railway companies to forwarding agents so that it is often more economical for the public to deal with the latter than directly with the railway companies.

*Underwriters* are persons who, in return for a certain commission, undertake that if the public do not take up shares in a company that is being floated, they themselves will take up and pay for a certain number of the shares. They are appointed by the company promoter. A company may lawfully pay a commission to an underwriter in consideration of his subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company provided—

(a) the payment of the commission is authorised by the articles and the commission paid or agreed to be paid does not exceed the amount or rate so authorised, and

(b) if the amount or rate per cent, of the comm-

ission paid or agreed to be paid is—

(1) in the case of shares offered to the public for subscription, disclosed in the prospectus; or

(11) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar and, where a circular or notice, not being a prospectus inviting subscription for the shares is issued, also disclosed in that circular or notice

*Auctioneers* are agents for both the buyer and the seller, although it is the seller who usually pays their commission. Where an auctioneer advertises a sale by auction "without reserve" he has implied authority and is indeed bound to sell to the highest bidder. Being an agent of both parties, he is empowered to make the necessary signed memorandum on behalf of either party. Where he is in possession of the goods for the purposes of their sale by auction, he has a *lien* upon them for his charges.

The owner may fix such reasonable terms as he chooses and the auctioneer must follow out the terms made by the owner. If an owner advertises the terms of the sale, bidders are deemed to have notice of these terms. These terms cannot be varied by the auctioneer. If, however, the owner publishes no special terms of sale, the auctioneer has implied authority to fix customary and reasonable terms. Bidders have the right to rely on such terms and the principal is bound by them.

In the absence of special instructions to the contrary, an auctioneer must sell for cash. He has possession of the goods, consequently has implied authority to receive payment of the price. He has no implied authority to warrant the goods. He cannot bid in his own interest. If bidders fraudulently combine not to bid against each other for the purpose of obtaining

the goods at a cheap price, no title passes to the highest bidder by reason of the fraud

So long as the auctioneer acts within his authority and reveals the name of his principal, he incurs no personal liability. But if he exceeds his authority in making a sale, he is liable in damages to his principal. If he does not reveal the name of his principal to bidders, he is liable personally to them.

An auctioneer is entitled to recover from his principal the amount of his compensation, including disbursements and expenses incurred in the sale, care, and preservation of the property. He has a right to retain possession of the goods until his compensation is paid or, in the case of sale, to deduct his charges from the proceeds of the sale.

When authorized to sell goods on credit, in case payments are not made when due, the auctioneer may sue in his own name. He may also sue in his own name for wrongful acts of third parties whereby the goods are injured. The principal also may bring this action in his own name. The principal is liable for the acts of his auctioneer committed within the actual or apparent scope of the latter's authority.

*Warehousers* are persons acting in the capacity of agents, whose business it is to receive goods for the purpose of storage, for which they make a charge.

Warehousing consists in putting commodities in a place of safe keeping until such a time as the market or the consumer can use them. Storage has always been recognised as a fundamental economic service in the smoothing out of supplies, the object being to adjust supplies to the buyer's needs so that price levels are kept steady and even.

A warehouseman is bound to exercise reasonable diligence in preserving the goods, and has a lien on the goods until his charges are paid; & he can retain the goods until he receives payment for warehousing them.

## CHAPTER V

# SALE OF GOODS

### Contract for sale of goods

A sale being a species of contract, it is necessary, in order that a sale may be valid, that it should contain all the elements that go to make up a good contract, such as competent parties, mutuality, consideration and legality. The reason why a separate law for the sale of goods exists is that a contract for sale of goods has certain peculiar features compared to other types of contract, and so far as these features exist separate legal provisions are necessary. These separate legal provisions are embodied in the Indian Sale of Goods Act, 1930. The object in the main is to give certainty where the parties to the contract of sale have failed to express their intentions, or where they had no definitely formed intentions.

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the *property* in goods to the buyer for a *price*. The transfer must be of the *absolute* or general property in the thing sold; for in law a thing may in some cases be said to have in a certain sense two owners one of whom has the general, and the other a special property in it, and a transfer of the special property is not a sale of the thing. For instance, when goods are delivered in pawn or pledge, the general property remains in the pawnor, and a special property is transferred to the pawnee. Again, the right of property may be in one person while right to possession may be in another person, *e. g.* where specific goods are contracted to be sold for cash, the property passes to the purchaser but the unpaid

seller may exercise his right of lien and retain possession till the price is paid.

Also, to constitute a contract of sale consideration for transfer must be *money*, paid or promised, according as the agreement may be for a cash or credit sale; but if considerations other than money be given, it is not a sale. For instance, goods may be given in consideration of work and labour done or for board and lodging, all of which are contracts for the transfer of the general and absolute property in the thing but they are not sales of goods.

### **Barter distinguished from sale.**

When the consideration for the transfer of the property in the goods from one person to another consists of the delivery of other goods the contract is not a contract of sale, but is a contract of exchange or barter. But if the consideration for such a transfer consists partly of the delivery of goods and partly the payment of money, the contract is a contract of sale. Again, money cannot be the price of money and so the change of a Government currency note for money is not a contract of sale.

### **Contract of sale distinguished from contract of work and material**

A contract of sale is also distinguished from contract of *work and material* where material is supplied by person doing work or otherwise. In such a case it is the substance of the contract to be gone into. If the substance of the contract is the production of something to be sold as a chattel, then that is sale of goods. But if the substance of the contract is that skill and labour have to be exercised for the production of the article and that it is only ancillary to that that there will pass from the producer to his client some materials in addition to the skill involved, the substance of the contract is skill and it will not be sale of goods. A picture dealer whose sole object is to acquire



something which he may sell in his business engages an artist to paint and deliver to him a picture of a given subject at an agreed price. It is a contract for the sale of goods. So it is in the case of a dentist making a set of teeth. But where an attorney is employed to draw a deed on paper and with ink furnished by him the contract is for work and not for the sale of goods.

### **Sale distinguished from bailment or agency.**

A sale is also distinguished from bailment as well as from agency. A bailment is a delivery of goods on a condition express or implied, that they shall be restored by the bailee, to the bailor or according to his directions, as soon as the purpose for which they were bailed shall be answered or kept till he reclaims them. A bailment does not constitute a sale, in that there is no transfer of title or ownership of the chattel, possession of which is given to another. For example, A hires the use of a horse and carriage from B, a liveryman for two days. A secures possession of the horse and carriage. He has the right to retain possession of them for two days and has the right to use them for the purpose hired. He cannot sell them, however, nor can he do anything inconsistent with B's ownership. This transaction is a bailment.

Similarly, a person to whom goods are sent to be sold, and who is at liberty to sell them at any price he pleases, he paying a fixed price for them to the owner, is not an agent. On the other hand, one who guarantees payment of the price for goods disposed of by him is an agent.

*Hire-purchase* agreements must also be carefully distinguished from contracts of sale on instalment basis. In a hire-purchase the hirer has merely an option to purchase. There is no immediate transfer of title and there is no person who "buys or agrees to buy". It does not become a sale until the conditions are fulfilled.

### **Sale distinguished from a contract to sell.**

As already noted, a transaction may be a *sale* or

it may be an *agreement to sell*. The distinction is in some circumstances important. For when there is a sale, the property in the goods goes to the buyer, even though the goods remain in the possession of the seller, and if the goods are lost or damaged the loss falls on the buyer. If, however, there is only an agreement to sell, there has been no conveyance of property. The risk of loss still remains with the seller along with his property in the goods. For example, A, a farmer, sells ten barrels of apples to B. B examines the apples, selects the ten barrels, pays A the stipulated price, and says he will call for them the following day. Before B calls, the apples are destroyed by fire, without fault of A. B must stand the loss. The title or ownership passed to him when the sale was made. If B calls on A and enters into a contract by the terms of which A agrees to deliver at B's residence ten barrels of apples the following day, at an agreed price, and the apples are destroyed by fire before A delivers them, the loss falls on A. This is a contract to make a sale, not a sale. Title to the apples does not pass to B until they are delivered by A, according to the terms of the agreement.

Parties may agree that title may pass at a certain time or upon the performance of a certain condition. In this event, title does not pass until the time mentioned arrives, or the condition is fulfilled.

An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

### Classification of sales.

Sales are classified as *executed* and *executory* or as *absolute* and *conditional*. The distinction between the executed and the executory sale is that in the former the title to the property has passed, if it has, the sale is executed though the price may not have been paid, if title has not passed, the sale is executory. Again, an absolute sale is an executed sale because title has passed. A *conditional* sale is one in which some-

thing remains to be done before title can pass. There are two kinds of conditions in this class of sales—*precedent* and *subsequent*. In a sale upon a condition precedent, no title vests until condition is fulfilled. Sales made on approval vest no title until the goods have been approved. Many transactions are of this character today. In a sale upon condition subsequent, the title to the property passes but the buyer has an option to divest himself of the title and to return the goods.

A condition may be express or implied. Where the contract was for delivery of bags of rice by railway waggons and both the parties knew that the Government had imposed waggon restrictions which interfered with easy transport, and the defendant was unable to supply according to the contract and pleaded impossibility as a defence, the court held that he was discharged.

A agreed to give B the use of a music hall for the purpose of a concert. Before midday of performance arrived, the music hall was destroyed by fire, and B sued A for damages for breach of the contract which A, through no fault of his own was no longer able to perform. It was held that such a contract must be regarded as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor.

### **Contract of sale of goods how made.**

A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The delivery may be either immediate or future and the payment may be either in cash or at some future date or in instalments. The actual contract of sale may be made either in writing or by word of mouth or partly in writing and partly by word of mouth subject to, of course, the provisions of any law for the time being in force; for instance, in the case of certain corporations contracts to be valid are to be required under seal,

Writing of course, will include printing, lithography and other modes of representing or reproducing words.

A contract of sale may also be implied from the conduct of the parties. A man goes into a restaurant, orders a dinner and eats it, obviously there is a sale though no mention be made of buying or selling or price. When a man takes up an article in a shop and pays for it or otherwise appropriates it with the owner's consent, the conduct of the parties gives rise to an inference of fact that the parties intend sale or purchase, though they do not express their intention in words.

### **Payment of deposit or earnest money.**

The paying of a deposit or earnest money, as it is called, is usually a security to the seller that the buyer will complete the sale. In that case if the sale goes off through the buyer's fault he forfeits the deposit. The parties may intend that the deposit may be both earnest and part payment. "The deposit serves two purposes. If the purchase is carried out, it goes against the purchase money. But its primary purpose is this, it is a guarantee that the purchaser means business". There may be an agreement that the deposit is forfeited when the sale goes off through the buyer's unwillingness or inability to complete.

### **Subject matter of a contract of sale — "goods"**

The term "goods" means every kind of moveable property other than actionable claims and money, and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. Chief instances of actionable claims are (1) claim for arrears of rent, (2) a claim for rent to fall due in future, being an accruing debt", (3) the benefit of an executory contract for the purchase of goods, (4) a right to get by division a price of land reserved by a donor for his own use in his deed of

gift, ( but possession of which was with the donee );  
 (5) a share in a partnership.

“Actionable claim” means a claim to any debt other than a debt secured by mortgage of immovable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession either actual or constructive, of the claimant, which the civil courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

### Kinds of goods

The goods which form the subject of a contract of sale may be either—

(1) *Existing goods* i.e. goods which are owned or possessed at the time of the contract of sale, or

(2) *Future goods* i.e. to be manufactured or produced or acquired by the seller after the making of the contract of sale

The goods again, may be either—

(a) *Specific* or *ascertained* goods, i.e. goods identified and agreed upon at the time when the contract of sale is made, or

(b) *General* or *unascertained* goods, i.e. goods not so identified but described or referred to by the parties in general terms

### Conditions and warranties.

We have examined before how contracts subject to certain conditions are discharged due to non-fulfilment of those conditions. We have also seen that all stipulations to which contracts may be subject are not conditions. A stipulation or a term relating to the subject matter of contract and in the case of sale of goods, to the subject matter of sale may be either a condition or a warranty. The buyer is entitled to have any conditions and warranties relating to the goods duly observed and performed.

A *condition* is a stipulation in a contract which is an essential term of a contract so that it goes to the root of the contract and the breach of which may, therefore, give rise to a right to treat the contract as repudiated. A *warranty*, on the other hand, is a stipulation which is not of such importance as to go to the root of the contract, but is collateral to the main purpose of the contract, the breach of which gives rise to an action for damages but not to a right to reject the goods or to treat the contract as repudiated.

Whether a stipulation is a condition or a warranty depends on the construction of the contract and a stipulation may be a condition though called a warranty in the contract. On a breach of condition the buyer may, if he chooses, bring an action for damages only instead of repudiating the contract, and he is limited to an action for damage only if a contract of sale is not severable and he has accepted the goods or any part thereof, unless there is a term in the contract to the contrary.

In the case of a contract the fulfilment of which is excused by law by reason of impossibility or otherwise, the fulfilment of any condition or warranty is excused. For instance, in a contract for the sale of specific goods the goods may have perished before the contract was made, or they may have perished after it was made but before the risk passed to the buyer. In both cases the performance of the contract has become impossible, and the agreement is therefore void.

*Stipulations as to time*—Stipulations as to time of payment are not deemed to be of the essence of a contract of sale, unless a different intention appears from the contract. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract. As a general rule in mercantile contracts, such as contracts "f o b" and "c. i f." the time of shipment or delivery is of the essence of the contract.

The general rule is expressed in the maxim  *caveat emptor* (i. e. let the buyer beware); hence, in the absence of any expressed stipulation by the buyer, the law will not imply any conditions or warranties in favour of the buyer except those mentioned below

*Implied conditions and warranties*— In every contract of sale, unless the terms of the contract are such as to show a different intention, there is—

(a) An implied *condition* on the part of the seller that, in the case of a sale, he has right to sell the goods, and that, in the case of an agreement to sell, he will have the right to sell the goods at the time when the property is to pass.

(b) An implied *warranty* that the buyer shall have and enjoy quiet possession of the goods.

(c) An implied *warranty* that the goods shall be free from any charge or encumbrance of a third party not declared or known to the buyer at the time when the contract is made.

The warranties or conditions implied by the Act may be excluded by the express terms of the contract.

Where a person sells goods, knowing that they are likely to be dangerous to the buyer and that the buyer is likely to be ignorant of the damage, he is under a duty to warn the buyer of the probable danger.

### **Quality of goods.**

There is an infinite variety of materials all differing in quality. After they have been collected from the extractive and manufacturing industries, they are next assorted and classified into different qualities, and may then be regarded as merchandise in the truest sense of the word. The goods are mixed, cut, refined, etc., and then grouped into recognised types each having its different characteristics. One of the most important points in a contract of sale is the determination of the

exact quality which the buyer has in mind

The *quality* is usually indicated by the buyer in one of the following ways—

- (1) General description of the goods
- (2) Sample or pattern
- (3) Analysis.
- (4) Type
- (5) Trade Mark or Patent name

*Description*—In the case of a contract for the sale of goods by description there is an *implied condition* that the goods shall correspond with the description. Particular descriptions such as Yorkshire Hams, Paisley Flour, English Cheddar, Japanese Silk, Broach Cotton, and when such goods are ordered the contract is fulfilled only when the commodities answer to their description. Sometimes goods are sold by *sample* or *pattern as well as description*, e.g. 200 yds Japanese Silk No 879, where the number indicates the particular pattern of the silk. In this case it is not sufficient if the bulk of the goods correspond with the sample if they do not also correspond with the description,

Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an *implied condition* that the goods shall be of merchantable quality. If, however, the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

*Merchantable quality* means that the goods comply with the description in the contract, so that to a purchaser buying goods of that description the goods would be a good tender. It does not mean that there will be purchasers ready to buy the goods, or that the goods will comply with the law of a foreign country, so as to be saleable there.

A sale of goods over a shop counter can be a sale of goods by description.



M asked for a bottle of Stone's ginger wine at F's shop, which was licensed for the sale of wines. While M was drawing the cork, the bottle broke and M was injured. It was held that the sale was one by description, and as the bottle was not of merchantable quality, M was entitled to recover.

*Sample or Pattern*—A sample is a small quantity of an article produced by the buyer as a specimen of the goods desired. A great variety of merchandise such as sugar, spirits, wine, coffee, etc. is sold by sample. A pattern is a specimen of a manufactured article such as cloth, paper, silk, leather etc. When goods are sold by pattern or sample, the seller guarantees that the goods shall at least equal, on an average, such sample or pattern. In the case of a contract for sale by sample or pattern three *conditions* are implied—

(a) That the bulk shall correspond with the sample or pattern in quality;

(b) That the buyer shall have a reasonable opportunity of comparing the bulk with the sample or pattern; and

(c) That the goods shall be free from any defect rendering them unmerchantable which would not be apparent on a reasonable examination of the sample

*Analysis*—Many products are sold upon analysis, that is to say, on the basis of a determined quality, so that the exact composition of the goods supplied is arrived at by the analyst. In this case a provisional invoice is first prepared, until the results of the analysis are known, when a definite invoice is made out. If the quality of the goods delivered is inferior to that stipulated in the contract, a proportional allowance is made, if it is superior, then there is a proportional increase in the price. As a rule, the contract gives the name of a chemist who is to be entrusted with the analysis, whilst in the case of many products there are special laboratories whose certificates of analysis are accepted without question.

*Type* — A type is a standard sample taken from the crop in the early part of the season and the year's growth is guaranteed to be equal to the type. Should the produce prove to be inferior, an allowance is usually made, the amount being settled by arrangement or by arbitration.

*Trade Marks or patents*— In the case of a contract for the sale of a specified article under its patent or other trade name, there is *no implied condition* as to its fitness for any particular purpose.

### **Buyer relying on seller's skill and judgment**

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that he relies on the seller's skill and judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an *implied condition* that the goods shall be reasonably fit for such purpose.

The purposes for which the goods are required need not be expressly made known to the seller if it can be readily gathered from a description of the goods. A, a milk dealer, supplied F with milk which was consumed by F and his family. The milk contained germs of typhoid fever and F's wife was infected thereby and died. It was held that the purpose for which the milk was supplied was sufficiently made known to A by its description, and as the milk was not reasonably fit for human consumption A had committed a breach of condition.

If the buyer relies on his own skill and judgment or on that of his advisers and not on that of the seller, no condition is implied. If he relies partly on his own judgment and partly on that of the seller the condition is implied if his reliance on the seller was a substantial and effective inducement to his purchase,

The buyer makes known to the seller that he relies on his skill if he makes known to the seller the purpose for which the goods are required and the circumstances are such that, as a reasonable man, the seller must have known that the buyer was relying on him. Thus, where the contract was to supply 500 tons of coal for the S S, "Manchester Importer", it was held there was an implied condition that the coal should be suitable for bunkering this particular ship.

The buyer may rely on the seller's skill and judgment although the contract is to make goods according to the plan and specification of the buyer. Where M agreed with C & Co., shipbuilders, to make two propellers for two specified ships in course of building, in accordance with C. & Co.'s plans and specifications, and to the satisfaction of Z, the shipowner, and one of the propellers was noisy and unfit for use, it was held that C & Co. had relied upon M's skill and judgment and could reject the unfit propeller, and as Z had expressed dissatisfaction, M had not complied with a condition of the contract.

As already noted, if the buyer purchases an article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose. But if he sells an article of the description in which he usually deals under its patent or trade name, there is an implied condition that it is of merchantable quality.

In a contract for work done and materials supplied there is an implied condition that the work shall be properly done in the contemplated manner and that the goods shall be reasonably fit for the contemplated purpose. Thus, where a dentist makes a denture, it is an implied condition that the dentures would fit the patient. Again, where M instructed B, motor repairers, to repair his motor car, and B obtained from the makers new connecting rods and fitted them to M's car, and one of them broke, it was held that, if M

relied on B's skill and judgment, there was an implied condition that the rods were fit for the purpose

### Transfer of the property between seller and buyer.

It is important to know the precise moment of time at which the property in the goods passes from the seller, because —

(a) in case of the destruction of the goods by fire or other accidental cause, it is necessary to know which has to bear the loss, and

(b) in case of the bankruptcy of either seller or buyer, it is necessary to know whether the goods belong to the trustee of the bank or not.

The "property" in the goods means the ownership of the goods, as distinguished from their possession.

*Specific goods* — In a contract for the sale of specific or ascertained goods the property passes to the buyer at the time when the parties intend it to pass. The intention must be gathered from the terms of the contract, the conduct of the parties, and the circumstances of the case. Unless a contrary intention appears, the following rules are applicable for ascertaining the intention of the parties. —

1. Where there is an unconditional contract for the sale of specific goods in a deliverable state the property passes to the buyer when the contract is made. *Deliverable state* means such a state that the buyer under the contract would be bound to take delivery of them. The fact that the time of delivery or the time of payment is postponed does not prevent the property from passing at once. For example, if X goes into a shop and buys a hat, asking the shopkeeper to send it to his house and to put it down to his account, and the shopkeeper agrees to do so, the hat immediately becomes the property of X.

2. Where there is a contract for the sale of specific goods not in a deliverable state, i.e., the seller has to do something to the goods to put them in a

deliverable state, the property does not pass until that thing is done and the buyer has notice of it

3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do something with reference to the goods for the purpose of ascertaining the price, the property does not pass until that thing is done and the buyer has notice of it

4. When goods are delivered to the buyer on *approval* or "*on sale or return*", the property therein passes to the buyer —

(a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction. K delivered jewelry to W on sale or return W pledged it with A. The pledge is an act by W adopting the transaction and therefore the property in the jewelry passed to him, so that K could not recover it from A.

If K when he delivered the jewelry to W had done so on the terms that it was to remain his property until settled for or charged, the property would not have passed to W until either of those events had happened.

(b) If he retains the goods, without giving notice of rejection, beyond the time fixed for the return of the goods, or, if no time is fixed, beyond a reasonable time

*Unascertained goods*—The property in unascertained goods does not pass until the goods are ascertained. The property in unascertained or future goods sold by description passes to the buyer when goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller. The buyer's assent may be either express or implied and be given either before or after appropriation is made. G sold to P 140 bags of rice, the particular bags being unascertained. On

February 27th P sent a cheque for the price and asked for a delivery order. G sent a delivery order for 125 bags from a wharf, and wrote saying that the remaining 15 bags were ready for delivery at his place of business. P did not send for the 15 bags until March 25th when it was found they had been stolen without any negligence on G's part. P sued to recover from G the price he had paid for the 15 bags. It was held that he could not succeed, because G had appropriated the 15 bags to the contract, and P's assent to the appropriation was to be inferred from his conduct in not objecting. The property in the 15 bags had therefore passed to P.

If there is a sale of a quantity of goods out of a larger quantity, *e.g.*, of ten tons of scrap iron out of a heap in X's yard, the property will only pass on the appropriation of the specified quantity by one party with the assent of the other. If the buyer has told the seller to send the goods by rail or some other mode of carriage, he will be deemed to have given his assent in advance to the subsequent appropriation by the seller of the goods he has put on rail.

Delivery by the seller of the goods to a carrier for the purpose of transmission to the buyer in pursuance of the contract is an appropriation sufficient to pass the property in the goods.

### **Reservation of right of disposal by the seller.**

The property in goods, whether specific or unascertained, *does not pass* if the seller reserves a right of disposal of the goods. Apart from an express reservation of the right of disposal, the seller is deemed to reserve the right of disposal in two cases ;—

1. Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent.

2. Where the seller sends a bill of exchange for the price of the goods to the buyer for his acceptance,

together with the bill of lading, the property in the goods does not pass to the buyer unless he accepts the bill of exchange,

**Risk *prima facie* passes with property.**

Unless otherwise agreed, goods remain at the seller's risk until the property has passed to the buyer, after which they are at the buyer's risk, whether delivery has been made or not. But if delivery has been delayed through the fault of either the buyer or the seller, the goods are at the risk of the party at fault.

**Sale by person not the owner.**

As a general rule, the sale of an article by a person who is not, or has not the authority of, the owner gives no title to the buyer, who will be obliged to give the article up to the true owner without any recompense from him. This rule is subject to the following exceptions :—

1. *Estoppel*—If the true owner stands by and allows an innocent buyer to pay over to money to a third party, who professes to have to right to sell an article in the belief that he is becoming the owner of it, the true owner will be estopped from denying the third party's right to sell.

2. *Sale by a mercantile agent* — Where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

A "*mercantile agent*" means a mercantile agent having in the customary course of business as such authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money

on the security of goods. The chief classes of mercantile agents are factors, brokers and auctioneers, to which reference has already been made.

A "*document of title to goods*" includes a bill of lading, dock-warrant, warehouse keeper's certificate, wharfinger's certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof to the possession or control of goods, or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer goods thereby represented. The various forms of documents of title to goods will be found explained subsequently at appropriate places.

3 *Sale by possessor of goods or document of title to them* — If a person who has sold goods remains in possession of the goods or of the documents of title to them, any sale or pledge by him to a buyer or pledgee who takes the goods in good faith without notice of the previous sale will give a good title to the buyer or pledgee. The effect of this is that if X, a shopkeeper, sells, *e. g.* a piano to Y and promises to deliver it, and before delivery sells and delivers it to Z, Z will get a good title to the piano, notwithstanding that the property had, before he purchased, passed to Y.

Again, if a person who has *bought or agreed to buy* goods obtains, with the seller's consent, possession of the goods or of the document of title to them, any sale or pledge by him to a buyer or pledgee who takes in good faith and without notice of any lien or other claim of the original seller against the goods, will give a good title to the buyer or pledgee. X sold copper to Y and sent him a bill of lading endorsed in blank, together with a draft for the price. Y was insolvent and did not accept the draft, but he handed the bill of lading to Z in fulfilment of a contract for the sale of the copper to him. Z paid for the copper, and took the bill of lading without notice of X's rights as unpaid seller.



X stopped the copper *in transitu*. It was held that as Y was in possession of the bill of lading with X's consent he could give a good title to Z

4. *Sale by person with voidable title.* — If the seller has a voidable title to goods and his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided that he did not know of the seller's defect of title and bought in good faith. Thus, if A by fraud obtains goods from B, A has only a voidable title to the goods, and B can, on discovering the fraud, rescind the contract. If A, before B rescinds the contract, sells to C, who buys in good faith and in ignorance of the fraud, C will get a good title.

5 *Sale by one of joint owners* — If one of several joint owners of goods has the sole possession of them by permission of the co-owners the property in the goods is transferred to any person who buys them of such joint owner in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

### **Performance of the contract.**

If is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the contract of sale. Unless there is an agreement to the contrary delivery of the goods and payment of the price are *concurrent* conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods

### **Delivery.**

Delivery may be made (a) by doing anything which the parties agree shall be treated as delivery, or (2) which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf. Thus, parties may in time of

war agree that the delivery of a despatch telegram may take the place of a bill of lading.

Delivery may be *actual* or *constructive*. Actual or physical delivery of goods takes place where the goods are handed over by the seller to the buyer or his agent authorised to take possession of and hold them on his behalf. Delivery is constructive when the goods themselves are not delivered, but the means of obtaining possession of the goods is delivered, *e. g.*, by delivering the key of a warehouse where goods are stored or the bill of lading which will entitle the holder to receive the goods on the arrival of the ship.

*Rules as to delivery* — Whether the seller has to send the goods to the buyer or the buyer has to take them from the seller depends on the terms of the contract. In the absence of any such terms, the rules as to delivery are —

1. The seller of goods is not bound to deliver them until the buyer applies for delivery.

2. Goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of agreement to sell or, if not then in existence, at the place at which they are manufactured or produced.

3. Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

4. If the goods are in possession of a third party, there is no delivery until such third party acknowledges to the buyer that he holds the goods on his behalf. The issue or transfer of any document of title to goods, however, operates as delivery even where the goods are in possession of a third person and is not affected by the provision of the rule.

5. Delivery must be made within a reasonable

time and at a reasonable hour.

6. The expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

7 Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is *prima facie* delivery to the buyer. But seller must make a reasonable contract with the carrier or wharfinger, otherwise the buyer may decline to treat the delivery to the carrier or wharfinger as delivery to himself. Where the carriage involves sea transit, the seller must give sufficient notice to the buyer to enable him to insure, otherwise the goods will be at the seller's risk.

8 If the seller agrees to deliver goods to the buyer at a place other than that where they are when sold, the buyer must, in the absence of agreement to the contrary, take the risk of deterioration as necessary incident to the course of transit.

Similarly, if the seller agrees to deliver goods at the buyer's premises and, without negligence, delivers them there to a person apparently authorised to receive them, and the person receiving them misappropriates them, the loss must fall on the buyer and not on the seller.

9. When the seller is ready and willing to deliver the goods and requests the buyer to take delivery and the buyer does not comply with his request within a reasonable time, the buyer is liable to the seller for (a) any loss occasioned by his neglect or refusal to take delivery; and (b) a reasonable charge for the care and custody of the goods.

*Effect of part delivery*—A delivery of part of goods in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole, but delivery of

part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder. Thus, where specific goods lying at a wharf were sold for a lump sum, and the seller left an order with the wharfinger to deliver the goods to the buyer, who had paid for them by a bill, and the buyer subsequently weighed the goods and took away part of them, it was held that there was a delivery of the whole of the goods.

*Delivery of wrong quantity*—It is the duty of the seller to deliver the exact amount which has been ordered. In the event of the delivery of a wrong quantity, the rules, subject to any usage of trade or special arrangement of dealing between the parties, are—

(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them. But if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may either—

(a) accept the goods ordered and reject the rest  
or

(b) he may reject the whole

If he accepts the whole of the goods so delivered he must pay for them at the contract price

Where the contract is for the sale of "about" so many tons, or so many tons "more or less", the seller is allowed a reasonable margin. If, however, he exceeds that margin the buyer cannot be compelled to accept the goods.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not in the order, the buyer may—

(a) accept the goods which are in accordance with the contract and reject the rest, or

(b) he may reject the whole of the goods.

**Instalment deliveries**—Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments

When there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and either buyer or seller commits a breach of contract it is a question depending on the terms of the contract whether the breach is a repudiation of the whole contract or a severable breach merely giving a right to claim for damages

If the breach is of such a kind as to lead to the inference that similar breaches will take place with regard to future deliveries, the contract can be at once repudiated by the injured party. For example, if the buyer fails to pay for one instalment under such circumstances as to suggest that he will not pay for future instalments, or the seller fails to deliver goods of the contract description under similar circumstances, the contract can be repudiated. X sold to Y 1,500 tons of meat and bone meal of a specified quality, to be shipped 125 tons monthly in equal weekly instalments. After about half the meat was delivered and paid for, Y discovered that it was not of the contract quality and could have been rejected, and he refused to take further deliveries

It was held that Y was entitled to do so, as he was not bound to take the risk of having put upon him further deliveries of goods which did not conform to the contract.

The tests to be applied are. first, the ratio quantitatively which the breach bears to the contract. and, secondly, the degree of probability or improbability that such a breach will be repeated. X bought from Y, Co 5,000 tons of steel to be delivered 1,000 tons monthly. After the delivery of two instalments, but before payment was due, a petition was presented to wind up Y. Co., and X refused to pay unless the sanction of the

court was obtained, being under the erroneous impression that this was necessary. It was held that the conduct of X in so refusing payment did not show an intention to repudiate the contract as so to excuse the liquidator of Y. Co. from making further deliveries.

### **Buyer's right of examining the goods**

Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. The seller is bound to afford to the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract, unless otherwise agreed. If the buyer does not examine the goods in spite of reasonable opportunity being given by the seller, the buyer is deemed to have accepted the goods.

### **Acceptance.**

Acceptance takes place when the buyer—

(a) intimates to the seller that he has accepted the goods, or

(b) does any act to the goods which is inconsistent with the ownership of the seller, or

(c) retains the goods, after the lapse of a reasonable time, without intimating to the seller that he has rejected them

P sold barley to B by sample, delivery to be made at T railway station. B re-sold the barley to X. The barley was delivered at T, and B, after inspecting a sample of it, sent it on to X. X rejected it as not being according to sample, and B claimed to be entitled to reject it. It was held that B's act in inspecting a sample and then ordering the barley to be sent on was an acceptance, and he could not afterwards reject it.

**Rights of unpaid seller against the goods.**

A seller of goods is deemed to be an "*unpaid seller*"—

(1) When the whole of the price has not been paid or tendered; or

(2) When a bill of exchange or other negotiable instrument, *e.g.* a cheque, has been accepted by the seller as conditional payment, and the condition on which it was accepted has not been fulfilled by reason of the dishonour of the instrument or otherwise. A sells 1 Md. of rice to B for Rs. 20/— B pays Rs. 20/— by cheque. A accepts the cheque. A's acceptance means that he accepts payment of the price for 1 Md. of rice on condition that the cheque will be paid. If the cheque is dishonoured, A will become an unpaid seller.

A seller includes any person who is in the position of a seller, *e.g.* an agent of the seller to whom the bill of lading has been endorsed.

**Unpaid seller's right.**

(A) An unpaid seller has the following rights notwithstanding that the property in the goods may have passed to the buyer

(i) He has lien on the goods for the price while he is in possession of them.

(ii) He has a right of stopping the goods in transit after he has parted with the possession of them, in case of the insolvency of the buyer

(iii) He has a right to re-sell the goods in some cases.

(iv) He can sue the buyer for the price of the goods.

(B) An unpaid seller has the following rights when he has parted neither with the possession nor with the property in the goods.

(i) He is entitled to compensation if the buyer refuses to accept delivery.

(ii) He has a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.

### Unpaid seller's lien.

A *lien* in general may be defined to be a right of retaining property until a debt to the person retaining it has been satisfied. A seller's lien arises, therefore, only when the property in the goods passes to the buyer. A seller's lien means that an unpaid seller, who is in *possession* of the goods sold but who has ceased to be the owner of such goods, is entitled to retain possession of them until payment or tender of the price in the following cases :—

(a) Where the goods have been sold on cash basis and without any stipulation as to credit

(b) Where the goods have been sold on credit, but the term of credit has expired.

(c) Where the buyer becomes insolvent

(d) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer

*Part delivery*—Where an unpaid seller has made part delivery of the goods, he may retain the rest in his possession unless the circumstances relating to such part delivery show that the seller agreed not to exercise his lien.

It is to be noted that the right of lien is an incident of actual possession by the seller and is not an incident of title and it can be exercised by the seller even though the property in the goods has passed to the buyer. Thus, the giving of a delivery order by a seller to a buyer does not of itself give the buyer such a possession of the goods as can deprive the seller of his lien for the unpaid price.

In a reported case, the appellants Grice were merchants in Australia and sold a quantity of tea to



the respondent Richardson. The tea was in the warehouse belonging to the appellants and the delivery orders were given to the respondent. The delivery orders were subsequently endorsed in favour of W & Co. by the respondent and a part of the tea was delivered to W. & Co. Thereafter W & Co became insolvent and the appellants refused to deliver the part of the tea sold which was still in their warehouse except on payment of price. It was held that the appellants were entitled to retain the tea in spite of the fact that the tea was remaining with them in the capacity as bailees for the respondent.

*Termination of lien*- The seller's lien being an incident of his possession, he loses it as soon as he gives the buyer possession and his only remedy for the unpaid price in that event is to sue the buyer for the price of the goods and he cannot rely on any rights on the goods superior to those of any other creditor. A lien is *lost*—

(a) when the goods are delivered to a carrier for the purpose of transmission to the buyer, without reserving the right of disposal of goods;

(b) When the buyer or his agent *lawfully* obtains possession of the goods;

(c) by waiver, that is, when the seller agrees with the buyer either expressly or impliedly that he would not exercise his right of lien.

A sells 300 oranges to B for Rs./10. A delivers the oranges to a Railway Company for transmission to B. He further makes out the Railway receipt in the name of B as the consignee and sends the receipt to B. Here A does not reserve the right of disposal. Hence he cannot retain the oranges lying in the Railway godown if B fails to pay the price subsequently. But if A made out the Railway receipt in his own name he could have retained the oranges as the receipt would indicate that he has reserved the right of disposal

A sells a car to B for Rs 2,000/- B gets on the car and drives the car to his own garage, before he has paid the price. Here A cannot retain the car as B has taken possession of the car *lawfully*. But suppose B wants to take the car to his own garage. A objects and demands payment of the price before B takes the car home. B pushes A down and drives the car to his own garage. Here A can retain the car as B has taken possession of the car *unlawfully*, i.e. by using force.

### **Seller's right of stoppage in transit**

When there is-

- (a) an unpaid seller of goods, who has
- (b) parted with possession of the goods, and
- (c) the buyer becomes insolvent, and
- (d) the goods are in transit,

the seller may resume possession of the goods and retain them until payment or tender of the price

A person is said to be insolvent who has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of insolvency or not

*Duration of transit* — (1) Goods are in transit from the time they are delivered to a carrier or other bailee for the purpose of transmission to the buyer until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee. But the taking of delivery must be done as an act of ownership. The mere touching or handling of the goods without an intention to exercise the right of ownership will not terminate the transit. In a case goods were consigned to buyer by a ship and the buyer became insolvent. The buyer under pressure from the captain sent his son to take the goods with definite instructions not to meddle with the goods. The son had the goods landed at the wharf where they were stopped by the sellers. It was held that the taking of

the goods by the son was not an act of ownership and the sellers were entitled to stop.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end. If goods are ordered to be sent to an intermediate place from which they are to be forwarded to their ultimate destination the transit is at an end if fresh instructions have to be sent to the intermediate place before the goods can be forwarded, but otherwise the goods are still in transit.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer. "If a consignee be in the habit of, with the consent of the owner, using the warehouse of a carrier, packer, wharfinger, or other person as his for own, instance, by making it the repository of his goods, and disposing of them there, the transit will be considered as at an end when they have arrived at such warehouse."

(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or a agent of the buyer. The decided cases establish the principle that if the seller delivers the goods to the master on board the ship as the agent of the buyer, the transit comes to an end. But if the goods are delivered to the master of the ship chartered by the buyer only as a carrier the transit does not come to an end. Where

the seller delivered the goods on board a ship belonging to the buyers and employed as a general trader, and the bills of lading were made out in the name of the buyers, it was held that the transit had come to an end by such delivery and the sellers were precluded from stopping the goods. On the other hand, where the seller delivered goods on board a ship chartered by the buyers and the destination was not known and no bills of lading were made out, it was held that the transit had not come to an end. The distinction is clear. In the latter case the goods were only delivered to a carrier whereas in the former the goods were given to an agent of the buyer and delivery to the agent is delivery to the buyer,

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end. A gives notice to a carrier to stop the goods. A has no authority to give such notice, he being neither the seller nor his agent. Subsequently the assignee of the insolvent buyer demands the goods. The carrier refuses to deliver the goods and hands them over to A. The stoppage is ineffective and the transit has come to an end on the wrongful refusal of the carrier to deliver the goods to the buyer's assignee. On the other hand if the right to stop is duly exercised the carrier must comply with it and he will be liable in damage if he wrongfully refuses.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.

*How stoppage in transit is effected* - The seller exercises his right of stoppage in transit either by taking possession of the goods or by giving notice of his claim to the carrier in whose possession the goods are. Such notice may be given either to the person in actual

possession of the goods or to his principal. In the latter case, the notice to be effectual, must be given at such time and in such circumstances that the principal by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

When notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

*Effect of sub-sale or pledge by buyer* - The unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. Where, however, a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, and, if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the right of the transferee.

### **Right of re-sale**

The right of stoppage in transit is a right to retain the goods until payment or tender of the price and its exercise does not, therefore rescind the contract or give the seller a right of resale, except in the cases mentioned below. If, however, an unpaid seller who has exercised his right of lien or stoppage in transit does resell the goods, the buyer obtains a good title to them as against the original buyer.

A right of resale exists under the following circumstances:

(a) Where the goods are of a perishable nature. If the seller suffers loss on re-sale due to a fall of price, the buyer must make good the loss. If the seller makes a profit on re-sale he is entitled to keep the profit. Added to this, the seller can sue the buyer for breach of contract.

(b) Where the goods are not of a perishable nature, the seller is entitled to re-sell the goods, provided he gives notice to the buyer of his intention to re-sell, and the buyer fails to pay or tender the price within a reasonable time from the giving of such notice. The seller is also entitled to sue the buyer for breach of contract. If, however, the goods are not perishable, or the seller sells non-perishable goods without notice, the seller is not entitled to recover from the buyer any loss he might suffer on the re-sale, and the profit on the re-sale, if any, will go to the buyer.

(c) Where the seller, at the time of the contract, reserves the right to re-sell in case the buyer defaults to pay the price, the seller can always sell the goods.

### **Right of withholding delivery**

As already explained, if the property in the goods has passed to the buyer, the unpaid seller has a right of lien or stoppage in transit as explained above. If, however, the property has not passed, the unpaid seller has a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit.

### **Actions for breach of the contract.**

*The seller*, in addition to his rights against the goods set out above, has two rights of action *against the buyer*.

1. *For the price* - Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for

the goods according to the terms of the contract, the seller may sue him for the price of the goods. Where under a contract of sale the property in the goods has not passed to the buyer, but according to the contract the price is to be paid on a certain day irrespective of delivery, the seller can sue the buyer for the price if the buyer refuses or neglects to pay the price on or before the appointed day.

In the absence of a contract to the contrary the court may award interest at such rate as it thinks fit, from the date of the tender of the goods or from the date on which the price was payable. The seller may also recover interest or special damage in any case where by law interest or special damages may be recoverable.

When the property in the goods has not passed, the proper remedy of the seller in the case of a breach of contract is the one following.

2. *For non acceptance* – An action for damages for non-acceptance lies when the buyer *wrongfully* refuses or neglects to accept and pay for the goods. Mark the word ‘wrongfully’ The buyer can refuse to take delivery if the goods are defective or not according to sample or description or if delivery was late or for any other reason which is contrary to the terms of the contract. But the buyer cannot refuse to take delivery if the goods are delivered according to the terms of the contract.

Also, when the seller is ready and willing to deliver the goods and request the buyer to take delivery, which the buyer does not do within a reasonable time, the seller may recover from the buyer —

(a) any loss occasioned by the buyer's refusal or neglect to take delivery; and

(b) a reasonable charge for the care and custody of the goods.

The measure of damages for non-acceptance is the estimated loss directly and naturally resulting in

the ordinary course of events from the buyer's breach of contract, which is, where there is an available market for the goods in question, the difference between the contract price and the market price at the date when the goods ought to have been accepted.

*The buyer* has the following actions against the seller for breach of contract —

1 *For non-delivery* — This arises when the seller *wrongfully* neglects or refuses to deliver goods to the buyer. The measure of damages is, as in the case of the action for non-acceptance, the estimated loss naturally resulting from the breach of contract which is, *prima facie*, when there is an available market for the goods, the difference between the contract price and the market price at the time when the goods ought to have been delivered.

If the buyer purchased the goods for resale and the seller knew of this, the measure of damages will be the difference between the contract price and the resale price, if the goods cannot be obtained in the market. If they can be obtained in the market, the buyer ought to obtain them there and so fulfil his contract of resale, with the result that the damages will be the difference between the market price and the contract price.

Where delivery is delayed but the goods are ultimately accepted notwithstanding the delay, the measure of damages is the difference between the value of the goods at the time when they ought to have been and the time when they actually were delivered.

2 *For recovery of the price* — If the buyer has paid the price and the goods are not delivered he can recover the amount paid. In the absence of a contract to the contrary, the court may award interest at such rate as it thinks fit to the buyer from the date on which the payment was made, in addition to any special damages recoverable under any law.



3. *For specific performance*—A buyer can only get his contract specifically performed, *i. e.*, obtain an order of the court compelling the seller to deliver the goods he has sold, when the goods are specific or ascertained. The remedy is discretionary and will only be granted when damages would not be an adequate remedy. If, therefore, the goods are ordinary articles of commerce which can readily be obtained in the market, specific performance will not be granted; but it will be granted if the goods are of special value or are unique, *e. g.* a picture, a rare book or a piece of jewellery

4. *For breach of condition*—On breach of condition the buyer is entitled to reject the goods. He cannot, however, as already noted, reject the goods if—

(a) he waives the breach of condition, and elects to treat it as a breach of warranty, or

(b) the contract is not severable and he has accepted the goods or part of them, or

(c) the contract is for specific goods, and the property has passed to the buyer.

In all these cases the breach of condition can only be treated as breach of warranty. If the breach of condition is that the goods are not of the contract description, the property will not pass, so that the buyer has the right to reject.

Contracts frequently contain a clause prohibiting the rejection of goods by the buyer. Such a clause has no effect unless the goods are within the contract description. Timber of different sizes was sold under a contract which provided that "buyers shall not reject the goods herein specified, but shall accept or pay for them in terms of contract against shipping documents". The timber delivered was not, in respect of quantity, the specified timber. It was held that the buyer could reject the timber, as the clause did not operate when the goods tendered were not the specified goods which the buyer contracted to buy.

5 *For breach of warranty*—On breach of warranty, the buyer can *either*

(a) set up against the seller the breach of warranty in diminution or extinction of the price, or

(b) maintain an action against the seller for breach of warranty

The measure of damages for breach of warranty is the estimated loss arising directly and naturally from the breach, which is *prima facie* the difference between the value of the goods as delivered and the value they would have had if the goods had answered to the warranty

### **Anticipatory breach.**

Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach

### **Sales by auction**

The following rules apply to auction sales—}

1 Each lot is *prima facie* deemed to be the subject of a separate contract of sale.

2 The sale is complete when the auctioneer announces its completion by the fall of the hammer or in any other customary manner. Until such announcement any bidder may retract his bid.

3. A right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf may bid at the auction. Where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person, and any

sale contravening this rule may be treated as fraudulent by the buyer

4. The sale may be notified to be subject to a reserved or upset price. On a sale by auction announced to be subject to a reserve price, each bid is accepted conditionally on the reserve being reached,

5. If the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

When *auctioneer* sells goods, he impliedly undertakes the following obligations :—

1. He warrants his authority to sell.
2. He warrants that he knows of no defect in his principal's title
3. He undertakes to give possession against the price paid into his hands.
4. He undertakes that such possession will not be disturbed by his principal or himself

Where an auctioneer, disclosing the fact that he is acting as agent but not disclosing the name of his principal, sells *specific goods* he does not warrant his principal's title to the goods. B bought a motor car at an auction sale conducted by C, an auctioneer. The car was sold on behalf of X, who had no title to it, and the true owner subsequently recovered it from B. B sued C for the return of the price. It was held that he could not recover as he knew C was an agent, and the sale was a sale of specific goods.

### C. I. F. contracts

A c i f. (cost, insurance, freight) contract is a contract for the sale of goods to be performed by the delivery of documents representing the goods, *i.e.*, of documents giving the right to have the goods delivered or the possible right, if they are lost or damaged, of

recovering their value from the shipowner or from underwriters. The duties of a seller under such a contract are :

(1) to ship at the port of shipment goods of the description contained in the contract;

(2) to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract;

(3) to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer,

(4) to make out an invoice of the goods, and

(5) to tender, within a reasonable time after shipment, the shipping documents, consisting of the bill of lading, the policy of insurance and the invoice, to the buyer.

During the voyage the goods are at the risk of the buyer. This risk will in ordinary cases be covered by the insurance, but if the goods are lost from a peril excepted in the ordinary policy of insurance current in the trade, the buyer must nevertheless pay the full price for delivery of the documents. B sold to C, 100 bales of cloth on c. i. f. terms. B shipped the goods, insuring them under a policy which did not cover war risks. This was customary. The ship carrying the goods was sunk by enemy. It was held that C was bound to pay the price on tender of the shipping documents, notwithstanding that the policy did not cover the risk by which the goods were lost.

Even if the seller knows that the goods have been lost at the time the shipping documents are tendered, he can still compel the buyer to take and pay for them.

It is the duty of the buyer to pay the price upon or within a reasonable time after tender of the shipping documents, whether or not the ship has arrived and although he has had no opportunity of inspecting the

goods to ascertain whether they are in accordance with the contract.

It is the duty of the seller under a c i f contract to deliver a bill of lading stating correctly the date of shipment of the goods, and if the date of shipment is incorrectly stated the buyer may rescind the contract.

### **F. O. B contracts**

Under as f o b (free on board) contract it is the duty of the seller to put the goods on board a ship, under a reasonable or ordinary bill of lading or other contract of carriage, for the purpose of their transmission to the buyer. The cost of putting the goods on board must be borne by the seller, but when once the goods are shipped they remain at the risk of the buyer. Delivery is complete when once the goods are put on board the ship, but the seller should give notice of the shipment to the buyer so as to enable him to insure; if the seller fails to do this, the goods will be at his risk.

The property in the goods does not pass to the buyer until after shipment. If, therefore, the seller is prevented from putting them on board by the failure of the buyer to name a ship, the proper remedy of the seller is an action for damages for non-acceptance and not an action for the price.

### **Ex ship contracts.**

When goods are sold ex ship, the duties of the seller are .--

1. To deliver the goods to the buyer from a ship which has arrived at the port of delivery at a place from which it is usual for goods of that kind to be delivered: -

2. To pay the freight or otherwise release the ship-owner's lien.

3 To furnish the buyer' with a delivery order, or some other effectual direction to the ship to deliver

The goods are at the seller's risk during the voyage and there is no obligation on the seller to effect an insurance on the buyer's behalf

### **Hire-purchase and credit-sale.**

During recent years two methods of selling goods on credit terms have become very popular. One is known as "hire-purchase" and the other as "credit-sale" or "deferred payment sale"

In hire-purchase agreements the customer agrees to hire the article in question and promises to pay the price in a number of instalments which are called rent; and he is also given an option to purchase the article on payment of the last instalment of the price. But although the goods actually come into the possession of the customer, the ownership still vests in the seller, who, if the customer fails to pay any instalment, can retake possession of the whole of the goods, as well as keep by way of forfeit the instalments already paid by the customer. In other words, until all the instalments have been paid, the goods remain the property *of the seller*, and the buyer does not obtain complete ownership until he has fulfilled his contract by paying the final instalment.

The hire-purchase system has been modified by enterprising retailers who, in order to offer further inducements to purchasers, have evolved the system of "deferred payments". Under this system the goods become the actual property of the buyer on payment of the first deposit, but in many cases a special agreement is arranged whereby, if the buyer fails to pay his instalments, the seller has the right to take possession of goods to the value of the amount unpaid, plus a reasonable allowance for expenses, whilst the buyer retains goods to the value of the amount paid, less the

*expenses incurred by the seller. The parties also can, and usually do, agree that no property in the article is to pass to the customer until the last instalment is paid and that if he is late in the payment of any instalment the balance of the price is to become due immediately.*

## CHAPTER VI

# NEGOTIABLE INSTRUMENTS

(Bills of Exchange, Cheques and Promissory Notes)

### Credit

"What the steam engine is in mechanism, what the differential calculus is in mathematics that is credit in commerce"  
— *Macleod*

Modern commerce is essentially different from what it was in the past. Not only have its size, the area of its operation and its speed increased enormously, but its nature has also become different. Commerce has now become world-wide, the market for most commodities is as wide as the whole world, and the bulk of the commodities entering commerce consist of articles of daily and popular consumption. The number of commercial transactions has multiplied a thousand-fold and so has their rapidity. To liquidate these transactions, some medium of exchange is needed. The quantity of money is not enough to liquidate even a very small part of them. It would be utterly impossible for commerce to be carried on on such a large scale with cash payments.

The instrument which has made modern commerce possible, as also the modern large-scale production with its necessary round-about process and division of labour, is called '*credit*'.

'Credit' in its literal sense means trust or confidence. Actually credit means the deferring of a payment; it means the power which one person has to induce another to put economic goods at his disposal for a time on promise of future payment. In popular language



this power is called his credit. When such a sale on credit takes place there is created a contract or obligation between the buyer and the seller. This contract or obligation consists of two parts; the right to demand payment in the person of the seller (who is the creditor) and the duty to pay, in the person of the buyer (who is the debtor). The right to demand in the person of the creditor is termed 'credit' while the duty to pay in the person of the debtor is the 'debt'.

*Essentials of credit* — Credit involves three essentials, viz (1) exchange or transfer of value; (2) time and (3) confidence-confidence both in the integrity and capacity of the borrower. It is a present transfer of economic goods or services in consideration of a promise of a future return of equivalent value. We know that commodities in the ordinary course of business pass through various hands. For instance, they pass from the manufacturer to the foreign importer, from the foreign importer to the wholesale dealer, from the wholesale dealer to the retailer and from the retailer to the ultimate consumer. If all these transactions were based on cash basis, and all the receivers of goods paid the price immediately on receiving them, every one of these agencies should possess very large quantities of ready money at command for what they require. And if all of them have not always got an adequate amount of ready money at command, they will have to stop or suspend their operations till they are able to get money from the ultimate consumer. It would mean that the stream of production and circulation would be vastly diminished and would not be continuous.

This brings in the question of *deferred payments*. If instead of cash payments there could be arranged a system of deferred payments between the various parties, the production will not diminish but will continue at the same rate or even at an accelerated one. The manufacturer sells the goods to the importer and agrees not to demand the price till sometime afterwards and

takes instead a promise from the importer for the payment of the sum involved at a certain future date. The same procedure is adopted between the wholesale dealer and the retailer.

*Transfer of credit*— The promises of the various purchasers would thus go to liquidate the various transactions, just as money would have done it. There may appear to be one difference, however, between the two, namely, that whereas the receipt of money would have enabled the seller to replace his capital, that of mere promise may put him out of pocket for the amount up to the time that the promise is redeemed or honoured. This introduces the element of transfer of these promises. The seller will not be out of pocket if he could use the buyer's promise to get goods which he wants and thus replace his capital. In actual practice this is possible. The seller in this case may buy the goods he wants from another seller and instead of giving him money or his own promise, may endorse and hand him over the promise which he holds. The other seller who now possesses the promise may similarly endorse it and hand it over to someone else in consideration of goods, and so on, till the time of the maturity of the promise, when the ultimate holder of the promise will directly present it to the original promisor and receive payment. Thus one promise will not only liquidate one transaction but many others without diminishing or suspending the stream of production.

*Credit and capital*— Credit, like money, can be applied to bring new products into existence as well. For example, take the case of a municipality that wants to construct a market place but has no ready money to do it. The municipality may issue bonds to the public and thus borrow money on these bonds repayable at a future date. The market place can now be built, and will be real capital, as it would produce profit when given on rent. And as rents are received the bonds might be redeemed and the debt cleared off. Credit has been able here to bring into existence a new product.

Credit, in fact being purchasing power, may be used to purchase labour as well as commodities. And it is clear therefore, that money and credit have exactly the same effects on the production and marketing of commodities.

*Credit and Banks* — In actual practice the transactions between traders and traders are numerous, and all the transactions are not for an equal amount, nor are all the traders known to one another. There arises, therefore, the necessity of institutions that must be widely known and trusted and whose business may be to purchase the credits or debts of various merchants or manufacture credit on the basis of the various commercial transactions. Such institutions are the *Banks*.

*Farms of credit* — Credit has thus various forms commercial credit, bank credit, public credit, industrial or capital credit, individual or personal credit. When merchants buy commodities on the basis of their credit it is known as *commercial credit*. This credit is however, very limited in scope and soon terminates. In order to extend its area and time, it must be exchanged with *bank credit*. Bills of exchange represent commercial credit. Their circulation is limited. But as soon as they are exchanged with bank credit notes and other instruments like banker's acceptances and letters of credit, they can be circulated over a much wider area. There are only some persons who know a particular merchant, and he cannot buy goods on credit from others on his own credit. But as soon as he gets it exchanged with bank credit, he can buy goods. Bank credit, which must be payable on demand, is not intended to be terminated or extinguished, but is created with the hope that it will continue in existence and work like money.

*Public credit* means the borrowing operation of Governments by means of interest bearing securities. *Capital or Industrial credit* refers to the borrowing of necessary finance by industrial corporations for their

business operations *Personal credit* refers to the obtaining of individual goods and money for consumption on credit.

### **Credit instruments**

Credit, in order that it may be capable of actual delivery, must be recorded on a material. When it is recorded on paper, the latter is called an *Instrument of Credit*. Instruments of credit are created in two forms. They may be in the form of an order from the creditor to the debtor for payments, or in the form of a promise of the debtor to pay his creditor or any one else he may name.

Commercial credit gives rise to Commercial Credit Instruments like the Bills of Exchange and the Promissory Notes, while Banking Credit gives rise to Banking Credit Instruments, such as the Bank Notes, Cheques, Letters of Credit etc. The difference between commercial credit instruments and banking credit instruments lies in their range of negotiability or acceptability. Banking credit instruments are more widely and readily accepted than those issued by private individuals. The reason is obvious. The bank is a more widely known and trusted institution, its credit instruments, therefore, have a wider acceptability.

Credit has given rise to numerous credit instruments. We shall now proceed to study some of these in every day use.

### **Negotiable instruments.**

The law relating to negotiable instruments in India is contained in the Negotiable Instruments Act of 1881. According to that act a '*negotiable instrument*' means a promissory note, bill of exchange or cheque payable either to order or to bearer. It does not mention *Hundi*s which is a very common and important negotiable instrument in India. It does not also explain the nature and characteristics of negotiable instruments. A negotiable instrument may be described as "one the

property in which is acquired by any one who takes it *bonafide* and for value, notwithstanding any defect of the title in the person from whom he took it, from which it follows that an instrument cannot be negotiable unless it is such and in such a state that the true owner could transfer that contract or engagement contained therein by simple delivery of the instrument." This definition involves two following characteristics of negotiable instrument, viz :—

1 Property in it passes from hand to hand by mere delivery.

2 The holder in due course is not affected by defects in title of his transferor or of previous holders

3 The holder in due course can sue in his own name.

4 He is not affected by certain defences which might be available against previous holders, *e g* fraud to which he is no party

5 It passes from hand to hand like cash and can be conveniently assigned in discharge of debts

## BILLS OF EXCHANGE.

### Bill of exchange.

A "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. Its two principal uses may be exemplified thus:

B owes A, A owes C. Instead of B making payment to A, and A making payment to C, A "draws" upon B in favour of C, *i. e.* A orders B in writing to pay to C what he (B) owes A. B undertakes to comply with this order such undertaking being expressed on the document by B, who thereupon becomes liable to

C if C is given possession of the document C is thus enabled to obtain payment from B, who upon payment discharges simultaneously his own debt to A and A's debt to C

Again, Y may owe X and X may desire to give Y six months' credit but not be in a position to forego the present use of the money. He may satisfy both himself and Y "drawing" upon Y *i. e.*, obtaining a bill from Y containing Y's present undertaking to pay in six months the then holder of the bill. X may then (if Y's credit be good) "discount" the bill, *i. e.* get Z to purchase the bill for the amount of it less a sum to remunerate Z for the six months which he will have to wait before he gets his money back and for the risk Z runs in not getting paid through the possible insolvency of X and Y

Thus, a bill of exchange performs two kinds of offices in commerce: it saves the transmission of coined money, and it enables creditors not only to fix down debtors to a day of payment, but to get the use of a sum equivalent to the debt (less a small discount) before it is properly due.

A "bill of exchange" may be an inland or a foreign bill. When drawn or made in British India, and made payable in, or drawn upon any person resident in, British India, it is deemed to be 'inland' and to be 'foreign' if not so drawn, made or, made payable

### **Form of bill of exchange.**

A simple example of a 'bill of exchange' is as follows :

A, a retailer, buys goods from B, a wholesaler merchant, for, say Rs / 200. The arrangement is that A should have a credit for one month after the date of the delivery of the goods and that a bill should pass between them. Therefore, B, when delivering goods to A presents an invoice for the goods he has sold and also

drawn on A. This draft would be known as the draft of B which has to be accepted by A, and returned to B which makes it a complete document. The draft as drawn will be in the following form :

Stamp	1. Faiz Bazar Delhi. December 23rd 1946.
One month after date pay to me or my order the sum of Rs two hundred only for value received	
(Sd) B	
To Mr. A	Accepted, (Sd) A, 23-12-1946

The above draft when accepted by A would bear across the face of it the following writing:—

Accepted 23rd December 1946.

(Sd) A

The holder of this bill, i. e. B, can now hold it till its due date i. e. 26th January 1947 (which includes three days of grace allowed by law) and recover Rs. 200/- on that date from A, the acceptor. If E likes he may endorse it over to any one in want of money before maturity of this bill, or he may discount it with his banker i. e. he may sell it for its value less a charge made by the banker by way of discount.

The usual form of a 'bill of exchange' is as follows:—

New Delhi, December 23rd, 1946.

Stamp

Three months after date pay to Mr. Sri Krishan  
or order the sum of Rs one thousand only for value received

Rs 1,000-0-0

Prem Prakash

To

Mr Ram Narain  
Chandni Chowk,  
Delhi.

Thus, there are three parties to a Bill—the drawer, the drawee and the payee Mr. Prem Prakash is the *drawer*, Mr Ram Narain is the *drawee* and Mr. Sri Krishan is the *payee*. It is the business of payee, on the first convenient opportunity, to get it accepted by the drawee, who if he agrees to pay the amount, will write accepted across the bill.

Here also the payee may keep the bill with himself till it matures or he may transfer it to same one else, by endorsing it. The *endorsee* may again endorse it and thus the bill may pass into several hands and can thus be transferred, from hand to hand and the property in the bill is also thereby transferred.

The '*holder*' of a bill is any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. When the bill is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

*Other forms of bill of exchange* — A bill may be drawn *payable on demand*, it would then read .

On demand pay A or order etc.



A bill *payable on presentment* (or sight) would read.

On presentment (or sight) pay A or order etc

Three months after date (or sight or presentment) pay Mr. A or order etc with interest thereon at 6 percent per annum

Or the bill may be drawn *payable to bearer*; it would read :

Ten days after date (or sight) pay the bearer the sum of Rs fifty, value received

It is to be noted that in India no Bill can be drawn *payable to bearer* on demand.

### Requisites of a bill of exchange.

From the definition given above, it may be deduced that there are eight requisites as to the form of a valid bill :—

1. *The bill must be an order*, not a request Accordingly, a document in the terms, "we hereby authorise you to pay on an account to the order of G Rs 6,000", is not a bill of exchange. So also "Mr. A, please to let the bearer have seven pounds and place it to my account, and you will oblige your honourable servant, R", is not a bill.

2. *The order must be unconditional*. Accordingly, instruments containing such conditions regarding payment as "on the death of A provided he leaves either of us sufficient to pay that sum" or "if we otherwise shall be able to pay it", or "after the marriage of a certain person", or "on the sale of certain goods," or "on drafts being honoured", or "on failure of realising the securities", or "as circumstances of the drawer will admit without detriment to him or his family" or "at the convenience of the promisor", or "in instalments ceasing from the death of the promisee" are *not* bills of exchange. In like manner, an instrument containing an order to pay 'provided that the terms of the letter are complied with' or '30 days after the arrival of the ship *Paragon* at Calcutta', or 'out of the fifth

payment when it should be due and allowed by J S or 'sixty days after sight or when realised,' is *not* a bill of exchange. For the same reason a bill containing an order for payment of money conditional upon the signing of a particular receipt is not valid; if, however the direction is not addressed to the drawee, the order is unconditional and the bill is valid.

On the principle above stated, it is required that a bill or note should not be made payable out of a particular fund, as thereby the payment is made dependent upon the existence or sufficiency of such fund. Thus, an instrument containing an order 'to pay a certain sum out of the money in your hands belonging to X company', or 'out of the money due from X as soon as you receive it', or 'out of the money arising from my reversion, when it is sold', or 'out of the sale proceeds,' or 'out of the money due or hereafter to become due under the will of my late father', cannot be a bill of exchange, though it may operate as an assignment of so much of the fund. But the statement of a particular fund in a bill of exchange will not validate it, if it is introduced merely as a direction to the drawee how to reimburse himself, or to show the particular account to be debited, or as a statement of the transaction which gives rise to the bill.

The promise or order to pay will not be conditional when it is made dependent upon an event which is certain to happen at some time or other or in other words, an event which is inevitable. If a bill is made payable on the death of a certain person, or twelve months after notice, or in four instalments, on the dates fixed in four years, or on the first January when X comes of age, will be valid. An instrument payable as per advice or as per memorandum of agreement is good as a bill of exchange.

3. *The order must be in writing.* This includes printing, engraving, lithographing, and in fact every mode by which words and figures can be expressed on

any material. The writing may be in pencil or in ink or may be on paper, parchment or any other convenient substitute for paper.

4 *The order must be signed by the maker*: The signature of the drawer is necessary and there cannot be a bill even if the instrument is accepted without the signature of the drawer. If space is left blank to insert the drawer's name, a *bonafide* holder may insert it under a presumed authority, and even if it was inserted without authority, the acceptor is still bound to a *bona fide* holder without notice. In a bill there can be *joint drawees*, but never alternate ones.

5. *The drawee must be a certain person*: He must be named or otherwise stated in the bill with reasonable certainty. Though he is not named, if the place of payment is fixed in the bill, he cannot deny the validity of the bill afterwards, as the incipient imperfection is cured by his acceptance. A bill addressed to one man can in no case be accepted by another. A bill may be addressed to two or more drawees whether they be partners or not, but an order addressed to two or more drawees in possession is not a bill of exchange, as there cannot be a series of acceptors. In a bill if the drawer and the drawee are the same person, it may be treated as a bill of exchange or promissory note at the option of the holder, when the same has been negotiated though that person is not entitled to treat it as such. If that drawee is *fictitious*, the instrument is not invalid and the above option still enures to the holders. If the drawee is *misnamed*, or *designated by description* only, that circumstance alone will not vitiate the bill.

6. *The sum to be paid should be certain*. Thus, an instrument containing a promise 'to pay £ 5 and such sums as by reference to books' is not a bill. A sum is certain although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange, or is payable by instalment providing that on default of payment of an

instalment, the balance unpaid shall become due.

If the amount undertaken or ordered to be paid is stated differently in figures and in words the amount stated in words shall be the amount undertaken or ordered to be paid.

7. *The bill must be payable to, or to the order of, a certain person or to the bearer of the instrument—* A bill is *payable to order* which is expressed to be so payable or which is expressed to be payable to a particular person and does not contain words prohibiting transfer, [e.g. a bill in the form "pay A B £ 500" is an order bill, but a bill "pay A B personally £ 500" is not an order bill] or it is payable to the order of a particular person. A bill payable to "the order of A B" is payable either to A B or to A B.'s order

A bill is *payable to bearer* when it is expressed to be so payable or when the only or last indorsement is an indorsement in blank.

When a bill, either originally or by indorsement is expressed to be payable to the order of a specified person, and not to him or his order it is nevertheless payable to him at his option.

A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees

8 *A bill must be stamped before it is issued—* What is the proper stamp-duty will be found explained in a later chapter

### **'Bill of exchange' payable on demand**

A bill of exchange is payable on demand if it is expressed to be payable on demand or at sight, or on presentation, or if no time for payment is expressed. The expression "*after sight*" means after acceptance, or noting for non-acceptance, or protest for non-acceptance.

A bill is payable at a determinable future time when it is expressed to be payable at a fixed period after date or sight, or after the occurrence of a specified event which is certain to happen, although the time of happening may be uncertain. For example, an order to pay three months after Y's death will be a valid bill, but an order to pay three months after X's marriage will not. Even though X does in fact marry, the order will not be a bill.

### **Bills in a set.**

Bills relating to foreign trade are frequently drawn in sets of two or three parts, which are identical in all respects, except that each refers to the others. The object of this method of drawing is to prevent loss and to save time in that the parts may be sent by different mails. Thus, time is saved by sending one part to be accepted whilst the remaining part or parts may be negotiated—the two operations being performed simultaneously.

Bills of exchange may be drawn in parts, each part being numbered and containing a provision that it shall continue payable only so long as the other remains unpaid. All the parts together make a set; but the whole set constitutes one bill, and is extinguished when one of the parts, if a separate bill, would be extinguished.

Only one part should be accepted or indorsed, but a person signing any part or more than one part is liable on each of those parts to a holder in due course. Discharge of one part is a discharge of the set, but if an acceptor pays a part other than the one he has accepted, he remains liable on the accepted part to a holder in due course. If two or more parts are negotiated to different *holders in due course*, the one whose title first accrues is deemed the true owner.

The following is the specimen form of a foreign bill drawn in a set,

Rs. 5,000/-

New Delhi, 24th December, 1946

Sixty days after sight of this first of bill of exchange (second and third of the same tenor and date unpaid) pay to *Punjab National Bank, New Delhi*, on order, the sum of *Five thousand rupees* and place to account of shipment of wheat per S S India, as advised.

To

Grain Importers, Ltd.  
Liverpool

Gopi Krishan

## Acceptance

After a bill has been issued, the holder should present it to the drawee for acceptance to find out whether the drawee is willing to carry out the order of the drawer. If the drawee signs his assent upon the bill, or if there are more parts thereof than one, upon one of such parts, and delivers the same or gives notice of such signing to the holder or to some person on his behalf, he "accepts" the bill. The drawee is then called the "acceptor".

The usual mode of accepting is for the drawee to write "accepted" across the face of the bill, and then to sign his name underneath. Mere signature without additional words will also be sufficient. Such acceptance may be made by a duly authorized agent on behalf of the drawee. The acceptance need not necessarily be on the face of the bill. An acceptance on its back is sufficient, but it is essential that it should be on the bill itself.

An acceptance is not complete, and there is no binding obligation upon the drawee to pay, until the accepted bill has been delivered over to the "holder" or notice of such acceptance has been given to him or

somebody on his behalf. At any time before delivery or notice to such holder, the acceptor is at liberty to cancel his acceptance.

The acceptor may sign acceptance even before the instrument is signed by the drawer, or while it is otherwise incomplete. If such acceptor delivers it to be completed with necessary insertions, then he will be bound to the extent warranted by the stamp. Acceptance can be only by a writing and on the bill. A foreign bill might even be accepted by letter.

When a bill is drawn in a set, the acceptance may be written on any part of it, and it must be written on one part only, because though the drawer signs all the parts of the set, if the drawer accepts more than one part, and the accepted parts get into the hands of different holders in due course, he will be liable on every such part as if it were a separate bill.

*Rules as to presentment for acceptance*— The rules as to presentment for acceptance are:—

1. Presentment for acceptance is necessary only in case of a bill of exchange payable *after sight i e*, not payable on demand or at sight.
2. Such a bill must, if no time or place is specified therein for presentment, be presented to the drawee thereof for acceptance, if he can, after reasonable search, be found, by the drawer or any holder thereof, within a reasonable time after it is drawn, and during business hours on a business day. '*Business hours*' mean the time during which by custom or usage business is carried on, and '*business day*' excludes all public holidays and also any day on which business is stopped by custom or by proclamation.
3. If the drawee cannot, after reasonable search, be found, the bill is dishonoured.
4. If the bill is directed to the drawee at a particular place, it must be presented at that place; and, if at the due date for presentment he cannot, after reason-

able search, be found there, the bill is dishonoured

5. Where authorised by agreement or usage, a presentment through the post office by means of a registered letter is sufficient

6. If a bill is drawn upon two or more persons, it must be presented to all of them, unless one has authority to accept for all, in which case, presentment may be made to him, as in the case of a partnership. If it is not accepted by the first of them or any one of them, it is doubtful whether the holder should present the bill to the others also, before he protests, for non-acceptance. But the holder is entitled to have the acceptance of all drawees, and if one of them refuses to accept, he may treat the bill as dishonoured

7. Presentment may be made to the duly authorised agent of the drawee, or where the drawee has died, to his legal representative, or, where he has been declared an insolvent, to his assignee. But he is *not bound* to do so. Thus, if the drawee be dead, the holder is not bound to find out his legal representative and take his acceptance

8. Even though the drawer requests the drawee not to accept the bill if presented, the holder must yet present it for acceptance, in order to render the drawer liable, nor will the fact that the holder knew or had reason to believe that the drawee will refuse to accept, or that he has become insolvent, affect this rule. But when once acceptance has been refused and notice given to the parties, the holder is not bound to present the bill again, although the drawer requests him to do so and promises that the bill be accepted.

9. Bills payable on demand or payable a certain number of days after date, *i.e.*, after the date on which it was drawn, or payable on a fixed date need not be *presented for acceptance*. A bill need not also be presented for acceptance where (i) the drawee is a fictitious person, or (ii) the drawee cannot be found on a reasonable search, or (iii) the drawee is incompetent to con-



tract, *e.g.*, when he is a minor or a lunatic, or (iv) the drawee becomes insolvent or dead.

10. The holder must allow the drawee forty-eight hours (exclusive of public holidays) to consider whether he will accept it where the drawee wants such a time. When a bill is not accepted within forty-eight hours of its due presentation the holder may treat it as dishonoured.

*Acceptance may be general or qualified*—On presentment the drawee may give either a general or a qualified acceptance, or he may refuse an acceptance. A *general* acceptance assents without qualification to the order of the drawer. An acceptance is *qualified* (a) where it is conditional, declaring the payment to be dependent on the happening of an event therein stated; (b) where it undertakes the payment of part only of the sum ordered to be paid, (c) where, no place of payment being specified on the order, it undertakes the payment at a specified place, and not otherwise or elsewhere, or where a place of payment being specified in the order it undertakes the payment at some other place and not otherwise or elsewhere; (d) where it undertakes the payment at a time other than that at which under the order it would be legally due.

The holder of a bill may refuse to recognise a qualified acceptance and treat the bill as dishonoured and sue the drawer accordingly. But when the bill has already been negotiated and gone through several hands, the holder for the time being cannot make the drawer or any previous indorsers liable on the bill if he has agreed to a qualified acceptance without their consent. It, however, the holder obtains the consent of the drawer and his previous indorsers for such qualified acceptance, he can make them liable on the bill if it is subsequently dishonoured. For example, A draws a bill on B for Rs. 1,000/—. A transfers the bill to X, and X to Y. Y presents the bill to B for acceptance. B gives a conditional acceptance to which Y agrees with-

out the consent of A and X. Subsequently B refuses to pay. Y cannot sue A and X on the bill. But if Y obtained the consent of A and X previous to his agreeing to the conditional acceptance, he could have sued A and X on the bill.

If the acceptance is procured by *fraud*, the acceptor is only liable to a holder in due course and not to other holders.

### **Negotiation.**

A bill is said to be negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the *holder* of the bill. Where the bill is payable to bearer it is negotiable by delivery thereof. Where it is payable to order, it is negotiated by the holder by indorsement and delivery thereof. If an order bill is delivered without indorsement, the transferee acquires such title as the transferor had in the bill, and in addition the right to have indorsement of the transferor.

### **Indorsement.**

When the holder of a bill signs the same for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a bill, he is said to indorse the same, and is called the "*indorser*."

There are various kinds of indorsements ;

(a) *Indorsement in blank*. An indorsement is said to be 'in blank' if the indorser signs his name only without naming any one to whom or to whose order the payment is to be made. So long as the indorsement remains in blank the bill can be transferred by mere delivery as if it were payable to bearer. But even where the indorsement is in blank the transferee cannot get payment unless he signs his own name over the indorsement.

(b) *Indorsement in full*. An indorsement is

said to be in full if the indorser not only signs his name but also adds a direction to pay the amount mentioned in the bill to, or to the order of, a specified person. The person so specified is called the "*indorsee*" of the bill. The indorsee becomes the payee on indorsement and is entitled to sue for the money due on the bill. The ordinary form of a full indorsement is "pay to A. B. or order" or "pay A. B." A full indorsement prevents the bill from being transferred by anybody but the indorsee, and none but the special indorsee or his legal representative can sue on it.

If a bill has been endorsed in blank, any holder may insert some person's name above the signature and so convert the indorsement into a special indorsement.

(c) *Conditional indorsement* · The indorser of a bill may, by express words in the indorsement, exclude his own liability thereon, or make such liability or the right of the indorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen. Where an indorser so excludes his liability and afterwards becomes the holder of the bill, all intermediate indorsers are liable to him. Thus, where the indorser of a bill signs his name adding the words "without recourse" upon this indorsement he incurs no liability. Again, A is the payee and holder of a bill. Excluding personal liability by an indorsement "without recourse", he transfers the bill to B, and B indorses it to C, who indorses it to A. A is not only re-instated in his former rights, but has the rights of an indorsee against B and C.

(d) *Restrictive indorsement* : A restrictive indorsement is one which prohibits further negotiation of the bill, as, for example, "pay D only", or "pay D for the account of X" or "pay D or order for collection." This gives the indorsee the right to receive payment of the bill, but no right to transfer his rights.

"*Holder of a bill*" — The 'holder' of a bill means any person entitled in his own name to the possession

thereof and to receive or recover the amount due thereon from the parties thereto. Thus, to be a holder a person must be possessed of two rights. (1) he must be entitled to the possession of the bill by his own right, (11) he must be entitled to recover the money due on the bill. Thus, an agent in whose safe custody a bill is, is not the holder of the bill.

*"Holder in due course"*— "Holder in due course" means any person who for consideration became the possessor of a bill if *payable to bearer*. In the case of a bill *payable to order*, a holder in due course means any person who for consideration became the payee or the indorsee thereof, before the amount mentioned in it became payable, without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. Suppose A draws a bill on B for Rs 500/- payable to C two months after date. C is the payee for consideration and when he gets possession of it before the date of payment he will become the *holder in due course*, provided he did not suspect A's title to the bill. C may, after he obtains possession of the bill, indorse it in favour of D for valuable consideration. D, the indorsee, will become the *holder in due course* if he gets possession of the bill before the date of payment and if he did not believe that C had a defective title.

### **Presentment for payment**

All bills must be presented for payment to the acceptor or drawee thereof respectively, by or on behalf of the holder. In default of such presentment the acceptor or drawee, as the case may be, is not liable to pay. Where authorized by agreement or usage, a presentment through the post office by means of a *registered letter* is sufficient. The following rules will apply.

1, Presentment for payment must be made during the usual hours of business, and, if at a banker's, within banking hours.

2. A bill made payable at a specified period after date or sight thereof, must be presented for payment at maturity.

3. A bill drawn or accepted payable at a specified place and not elsewhere must, in order to charge any party thereto, be presented for payment at that place.

4. A bill drawn or accepted payable at a specified place must, in order to charge the drawer thereof, be presented for payment at that place.

5. A bill not made payable as mentioned above, must be presented for payment at the place of business (if any), or at the usual residence, of the drawee or acceptor thereof, as the case may be.

6. If the drawee or acceptor of a bill has no known place of business or fixed residence, and no place is specified in the bill for presentment for payment, such presentment may be made to him in person wherever he can be found.

7. A bill payable on demand must be presented for payment within a reasonable time after it is received by the holder

8. Presentment for payment *may* be made to the duly authorised agent of the drawee or acceptor as the case may be, or, where the drawee or acceptor has died, to his legal representative, or where he has been declared an insolvent, to his assignee.

9. Delay in presentment for payment is excused if the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made within a reasonable time.

*When presentment for payment is unnecessary:—*  
A bill need not be presented for payment in the following cases :

1. Where the drawee or acceptor of a bill intentionally prevents its presentment.

2. Where the bill being payable at his place of business, or at some other specified place, the drawee or acceptor closes such place on a business day during the usual business hours, or cannot be found at such other specified place.

3. Where the bill not being payable at any specified place, the drawee or acceptor cannot after due search be found.

4. Where the drawee or acceptor has agreed to pay even if there is no presentment.

5. Where the drawee or acceptor makes a part payment or promises to pay in part or full after knowing that the bill has not been presented although it has become mature, or in any other way waives his right to demand presentment.

6 Where the drawer could not suffer damage for non-payment, any holder can make the drawer liable without presentment *e. g* where the drawer draws the bill for himself, or where the drawee is a fictitious person.

In these cases the bill is regarded as dishonoured and the holder can avail himself of the remedies open to him in case of dishonour.

### **Dishonour.**

A bill of exchange is said to be dishonoured by non-acceptance when the drawee, or one of several drawees not being partners, makes default in acceptance upon being duly required to accept the bill, or where presentment is excused and the bill is not accepted. When the drawee is incompetent to contract (as in the case of a minor or a lunatic), or the acceptance is qualified, the bill may be treated as dishonoured.

A bill is said to be dishonoured by non-payment when the acceptor of the bill makes default in payment upon being duly required to pay the same.

*Notice of dishonour:* When a bill is dishonoured by non-acceptance or non-payment the holder thereof must give notice of the dishonour to all other parties whom the holder seeks to make liable thereon. Any party receiving notice of dishonour must, in order to render any prior party liable to himself, give notice of dishonour to such party within a reasonable time. For example, A draws a bill on B for Rs. 1,000/-. A indorses it to X and X to Y and Y to Z. Z presents the bill to B for acceptance and B refuses. Z must notify A, X and Y if he wants to make them all liable. If he wants to make only Y liable, he must notify Y. If Y wants to make A and X liable, he must notify them and so on.

No notice is necessary to the drawee or acceptor of the dishonoured bill of exchange.

*Mode in which notice may be given :* Notice of dishonour may be given to a duly authorised agent of the person to whom it is required to be given, or, where he has died, to his legal representative, or, where he has been declared an insolvent, to his assignee. It may be *oral or written*, may, if written, be sent by post, and may be in any form, but it must inform the party to whom it is given that the bill has been dishonoured, and in what way, and that he will be held liable thereon. It must be given within a reasonable time after dishonour, at the place of business or (in case such party has no place of business) at the residence of the party for whom it is intended.

If the notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid.

The following further rules shall apply :

(1) Any party receiving notice of dishonour must, in order to render any prior party liable to himself, give notice of dishonour to such party within a reasonable time, unless such party otherwise receives due notice as explained above.

(ii) When a bill is deposited with an agent for presentment, the agent is entitled to the same time to give notice to his principal as if he were the holder giving notice of dishonour, and the principal is entitled to a further like period to give notice of dishonour

(iii) When the party to whom notice of dishonour is despatched is dead, but the party despatching the notice is ignorant of his death, the notice is sufficient

*When notice of dishonour is unnecessary* No notice of dishonour is necessary

(a) When it is dispensed with or waived by the party entitled thereto, *e g* when an indorser on the face of the indorsement writes "no notice of dishonour required", the indorsee can make him liable without giving him notice of dishonour,

(b) in order to make the drawer liable when the drawer himself has put impediment in the way of payment by the drawee, *e g*, when the drawer has sent wrong or damaged goods to the drawee and has thus caused difficulty to the drawee in making payment,

(c) in order to charge a party who could not suffer damage for want of notice, *e g*, when the drawer draws a bill without sending any goods he cannot suffer any damage if notice of dishonour by the drawee is not communicated to him by the holder. In such a case the holder can make the drawer liable without giving him notice,

(d) when the party entitled to notice cannot, after due search, be found, or the party bound to give notice is unable to give it without any fault of his own;

(e) in order to charge the drawer when the drawer draws the bill on himself or his agent, *i e* where the acceptor is the drawer,

(f) When the party entitled to notice promises



to pay the amount due on the bill unconditionally after knowing the facts

### Noting.

Besides giving notice of dishonour to prior parties a holder of a dishonoured bill usually has the fact of dishonour noted down upon the bill, or upon a paper attached thereto or partly upon each by a *notary public* who is a person appointed by the Central Government for this purpose. The notary public notes down the following facts; (a) the fact of dishonour, (b) the date of dishonour, (c) the reason, if any, assigned for dishonour, or, if the bill has not been expressly dishonoured, the reason why the holder treats it as dishonoured, and (d) the notary's charges

Noting serves as an authentic proof of dishonour. Such noting must be made within a reasonable time after dishonour.

### Protest.

When a bill has been dishonoured by non-acceptance or non-payment, the holder *may*, after having such dishonour noted as above, obtain a certificate from the notary public. Such certificate is called a *protest*.

When the acceptor of a bill has become insolvent, or his credit has been publicly impeached, before the maturity of the bill, the holder *may*, within a reasonable time, cause a notary public to demand better security of the acceptor and on its being refused, within a reasonable time, cause such facts to be noted and certified as aforesaid. Such certificate is called a *protest for better security*.

*Contents of protest:* A protest must contain—

(a) either the bill itself, or a literal transcript of the bill and of everything written or printed thereupon;

(b) the name of the person for whom and against whom the bill has been protested;

(c) a statement that payment or acceptance, or better security, as the case may be, has been demanded of such person by the notary public, the terms of his answer, if any, or a statement that he gave no answer, or that he could not be found,

(d) when the bill has been dishonoured, the place and time of dishonour and, when better security has been refused, the place and time of refusal,

(e) the subscription of the notary public making the protest,

(f) in the event of an acceptance for honour, or of a payment for honour, the name of the person by whom, of the person for whom, and the manner in which such acceptance or payment was offered and effected.

A notary public may make the demand mentioned in clause (c) above either in person or by his clerk or, where authorized by agreement or usage, by registered letter

*Notice of protest* — When a bill is required by law to be protested, notice of such protest must be given instead of notice of dishonour, in the same manner and subject to the same conditions, but the notice may be given by the notary public who makes the protest

*Protest for non-payment after dishonour by non-acceptance* — All bills of exchange drawn payable at some other place than the place mentioned as the residence of the drawee, and which are dishonoured by non-acceptance, may, without further presentment to the drawee, be protested for non-payment in the place specified for payment, unless paid before or at maturity

*Protest of foreign bills* — Foreign bills of exchange must be protested for dishonour when such protest is required by the law of the place where they are drawn.

As already noted, foreign bills of exchange are.—

(a) bills drawn outside British India and made payable in, or drawn upon any person resident in any country outside British India, (b) bills drawn outside British India and made payable in British India or drawn upon any resident therein, and (c) bills drawn in British India and made payable outside British India, or drawn upon any resident outside British India, but not made payable in British India. It is only foreign bills that require to be protested and they too need not be protested when the law of the place where they are drawn does not acquire a protest.

*When noting equivalent to protest* — Where a bill is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding, and the formal protest may be extended at any time thereafter as of the date of the noting.

### **Liability of parties.**

Every person capable of contracting, according to the law to which he is subject, may bind himself and be bound by the making, drawing, acceptance, indorsement, delivery and negotiation of a bill of exchange. A *minor* may draw, indorse, deliver and negotiate a bill so as to bind all parties except himself. A *corporation* is not empowered to make, indorse or accept a bill except in cases in which, under the law for the time being in force, they are so empowered.

*Agency* — Every person capable of binding himself or being bound, as mentioned above, may so bind himself or be bound by a *duly authorized agent*, acting in his name. But a general authority to transact business and to receive and discharge debts *does not confer* upon an agent the power of accepting or indorsing bills of exchange so as to bind his principal. Also, an authority to draw bills of exchange does not of itself import an authority to indorse.

An agent who signs his name to a bill without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the bill, except to those who induced him to sign upon the belief that the principal only would be held liable.

*Legal representative* — A legal representative of a deceased person who signs his name to a bill is liable personally thereon unless he expressly limits his liability to the extent of the assets received by him as such.

*Drawer* — The drawer of a bill is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to, or received by, the drawer as explained above

*Acceptor* — In the absence of a contract to the contrary, the acceptor before maturity of a bill of exchange is bound to pay the amount thereof at maturity according to the apparent tenor of the acceptance, and the acceptor of a bill at or after maturity is bound to pay the amount thereof to the holder on demand. In default of such payment, the acceptor is bound to compensate any party to the bill for any loss or damage sustained by him and caused by such default.

No person except the drawee of a bill or all or some of several drawees, or a person named therein as a drawee in case of need, or an acceptor for honour, can bind himself by an acceptance.

Where there are several drawees of a bill who are not partners, each of them can accept it for himself, but none of them can accept it for another without his authority.

"*Drawee in case of need*" is a person whose name is given in the bill or in any indorsement thereon in addition to the drawee to be resorted to in case of need.

"*Acceptor for honour*" is a person who accepts a bill in *supra protest* for honour of the drawer or for any one of the indorsers, when a bill has been noted or protested for non-acceptance or for better security

*Indorser* — In the absence of a contract to the contrary, whoever indorses and delivers a bill before maturity, without, in such indorsement, expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor or maker to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given to or received by, such indorser as explained above.

Every indorser after dishonour is liable as upon a bill payable on demand.

*Prior parties to holder in due course* — Every prior party to bill is liable thereon to a holder in due course until the bill is duly satisfied.

*Liabilities as principals* — The drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable therein as sureties for the drawer or acceptor, as the case may be.

As between the parties so liable as sureties each proper party is in the absence of a contract to the contrary, also liable therein as a principal debtor in respect of each subsequent party. A draws a bill payable to his own order on B, who accepts. A afterwards indorses the bill to C, C to D and D to E. As between E and B, B is the principal debtor, and A, C and D are his sureties. As between E and A, A is the principal debtor, and C and D are his sureties. As between E and C, C is the principal debtor and D is his surety.

When the holder of an accepted bill of exchange enters into a contract with the acceptor which, under

sections 134, 135 of the Indian Contract Act, 1872, would discharge the other parties (by release or discharge of principal debtor or when creditor compounds with, gives time to, or agrees not to sue, principal debtor), the holder may expressly reserve his right to charge the other parties, and in such case they are not discharged

*Discharge of indorser's liability* — When the holder of a bill, without the consent of the indorser, destroys the indorser's remedy against a prior party, the indorser is discharged from liability to the holder to the same extent as if the bill had been paid at maturity. A is the holder of a bill of exchange made payable to the order of B, which contains the following indorsements in blank :—

First indorsement, "B" Second indorsement, "Peter Williams" Third indorsement, "Wright & Co." Fourth indorsement, "John Rozario".

This bill A puts in suit against John Rozario and strikes out, without John Rozario's consent, the indorsement by Peter Williams and Wright & Co. A is not entitled to recover anything from John Rozario,

*Forged indorsement* — An acceptor of a bill *already indorsed* is not relieved from liability by reason that such indorsement is forged, if he knew or had reason to believe the indorsement to be forged when he accepted the bill

*Bill drawn in fictitious name* — An acceptor of a bill drawn in a fictitious name and payable to the drawer's order is not, by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an indorsement by the same hand as the drawer's signature, and purporting to be made by the drawer.

*Bill without consideration*— A bill drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But

if any such party has transferred the bill with or without indorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him may recover the amount due on such bill from the transferor for consideration or any prior party thereto.

This rule is subject to two *exceptions*. namely, (1) no party for whose accommodation a bill has been drawn, accepted or indorsed can, if he has paid the amount thereof, recover thereon such amount from any person who became a party to such bill for his accommodation; (2) no party to the bill who has induced any other party to draw, accept, indorse or transfer the same to him for a consideration which he has failed to pay or perform in full shall recover thereon an amount exceeding the consideration (if any) which he has actually paid or performed.

*Partial absence or failure of money consideration* — When the consideration for which a person signed a bill consisted of money, and was originally absent in part or has subsequently failed in part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionately reduced.

The drawer of a bill stands in immediate relation with the acceptor. The maker of a bill stands in immediate relation with the payee and the indorser with his indorsee. Other signers may by agreement stand in immediate relation with a holder.

A draws a bill on B for Rs 500 payable to the order of A. B accepts the bill, but subsequently dishonours it by non-payment. A sues B on the bill. B proves that it was accepted for value as to Rs. 400/-, and as an accommodation to the plaintiff as to the residue. A can only recover Rs. 400/-

*Partial failure of consideration not consisting of money* — Where a part of the consideration for which a person signed a bill, though not consisting of money, is ascertainable in money without

collateral enquiry, and there has been a failure of that part, the sum which a holder standing in immediate relation with such a signer is entitled to receive from him is proportionately reduced

*Holder's right to duplicate of lost bill* — Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

### **Discharge of the bill**

The maker, acceptor or indorser of any bill is liable for payment to the holder

This liability can be discharged in the following ways

(a) *By payment* — In the case of a bill payable to bearer, or which has been indorsed in blank, a payment in due course to the person in possession of the bill, discharged the liability of the party making the payment to all the parties, though the possessor of the bill is not a 'holder' All parties to a bill are also discharged when the acceptor, drawee or drawer pays the amount due, on the maturity of the bill, to the holder

(b) *By cancellation* — An indorser or an acceptor is discharged from all liability to a holder, or any one claiming under him, who cancels such indorser's or acceptor's name with intent to discharge him

(c) *By release*—A drawer, or an indorser or an acceptor is discharged from liability to a holder when the holder agrees to release or releases in any other way except by cancellation such drawer, indorser or acceptor This will also discharge liability to all



parties deriving title under such holder after notice of such discharge.

(d) *By default of the holder*— (i) If the holder of a bill allows the drawee more than forty-eight hours, exclusive of public holidays, to consider whether he will accept the same, all previous parties not consenting to such allowance are thereby discharged from liability to such holder.

(ii) If the holder of a bill agrees to a qualified acceptance all previous parties whose consent is not obtained to such acceptance are discharged as against the holder and those claiming under him

(iii) If the holder fails to give notice of dishonour to all previous parties they are discharged as against the holder and those claiming under him. But the acceptor of a bill or the drawer of a bill still remains liable to the holder as they are already parties to the bill

(e) *By material alteration*—Any material alteration of a bill while in the possession of the holder, discharges the liability of all parties prior to or at the time of such alteration who do not consent to such alteration, unless it was made to carry out the common intention of the original parties. The following may be regarded as material alterations.

(i) Alteration in date, (ii) alteration in the time of payment; (iii) alteration in the place of payment; (iv) alteration in the amount payable, (v) alteration in the medium and method of payment and (vi) alteration of parties

In some cases, however, even material alterations do not discharge the liabilities of the parties to a bill. These are, for instance :

(i) Alteration made before the issue, delivery or negotiation of the bill, *i.e.* before its competition

(ii) Alteration made in order to rectify a *bona fide* error.

(iii) Alteration made with the consent of the parties.

(iv) Alteration made by the way of converting an indorsement in blank into an indorsement in full.

### **Acceptance and payment for honour.**

It has been noticed above that when a bill is dishonoured the holder can forthwith sue the drawee and all the previous parties to the bill. But when a bill has been noted or protested for non-acceptance or for better security, any person not being a party already liable thereon, may, with the consent of the holder, by writing on the bill, accept the same for the honour of any party thereto. The purpose of such acceptance is to save the honour of any party liable on the bill and most usually to save the prestige of the drawer.

A person desiring to accept for honour must by writing on the bill under his hand declare that he accepts under protest the protested bill for the honour of the drawer or of particular indorser whom he names, or generally for honour. Where the acceptance does not express for whose honour it is made, it shall be deemed to be made for the honour of the drawer.

*Liability of an acceptor for honour* — An acceptor for honour is liable to all parties subsequent to the party for whose honour he accepts to pay in case the drawee makes default in payment. For example, A draws a bill on B. A indorses it to C and C to D and D to E and E to F. B refuses to accept the bill. Then X accepts it for honour of D. X is liable to E and F, and he can sue A and C for payment in case B refuses to pay.

A party subsequent to the one for whom the acceptor for honour accepts can claim payment from the acceptor for honour only when —

(1) he has presented the bill to the drawee for payment after maturity. and

(2) the drawee has refused to pay, and

(3) the refusal has been duly noted and protested by a notary public

### **Payment for honour.**

If a bill is dishonoured by non-payment, any stranger may pay the dishonoured bill for the honour of any party liable to pay thereon provided that the person so paying or his agent in that behalf has previously declared before a notary public the party for whose honour he pays and that such declaration has been recorded by such notary public. Such payment is known as payment for honour and any person so paying is entitled to all the rights in respect of the bill, of the holder at the time of such payment and may recover from the party for whose honour he pays all sums so paid, with interest thereon and with all expenses properly incurred in making such payment.

## **PROMISSORY NOTES**

### **Promissory note**

A "promissory note" is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of a certain person, or to the bearer of the instrument. Payment may be on demand, or at a fixed or determinable future time

*Form of a Promissory Note*

<div style="border: 1px solid black; width: 100px; height: 80px; margin: 0 auto; display: flex; align-items: center; justify-content: center;">Stamp</div>	<div style="text-align: right; margin-bottom: 20px;">New Delhi, December 27th, 1946</div> <p style="text-align: center;">On demand (or at three months after date)</p> <p>I promise to pay Mr B or order ( or bearer ) the sum of Rs Five hundred only with interest at 6 per cent per annum from the date hereof until maturity, for value received</p> <p style="text-align: right;">Sd (A)</p>
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Here A is the *maker* and B the *payee*

An instrument to be a Promissory Note must therefore have the following essentials

(i) *It must be in writing* Mere verbal promise to pay is not enough The writing may be on any paper, on any *bahī* or book, on parchment or any other substitute for paper It may be in pencil or in ink or printing, typewriting, engraving or lithographing, or in any other mode of representing or reproducing words in a visible form so long as the words import a clear unconditional promise to pay a certain sum of money to a person whose identity is certain.

(ii) *It must contain a promise to pay* — There is no promissory note unless there is an express promise or undertaking to pay A mere acknowledgment of debt will not do Thus, it will not be sufficient if A says "Mr. B, I owe you Rs 1,000" A request for a loan is not a promissory note but a proposal of contract.

(iii) *The undertaking to pay must be unconditional* · "I promise to pay B Rs 500, seven days after my marriage with C."

"I promise to pay B Rs. 500, on D's death, provided D leaves me enough to pay that sum."

"Rs 500 is required. Please send it by bearer. The amount will be returned with interest at 12 per cent. without delay."

In all these and similar cases the undertaking is conditional or uncertain and hence there is no promissory note.

The undertaking to pay does not become conditional if the amount is made payable at a particular place or after a specified time or on the happening of an event which must happen although the time of its happening may be uncertain.

A document does not become non-negotiable where in addition to pay the amount there is the agreement to pay interest at a specified rate.

(iv) *The promissory note must be signed by the maker.* The signature may be in any part of the instrument, it may be a thumb-mark, initials or any other mark, it may be in pencil or in ink or even in printing or lithograph or stamp if these are adopted by the maker. Thumb mark or any other mark is sufficient when a person is illiterate, but when the executant is able to write his mark it will not be sufficient. The only requirements of a signature are that it shall indicate with certainty the identity of the person and his intention to be bound by the terms of the agreement. Attestation is not necessary even in the case of a mark, but an instrument does not lose its character as a note by containing attestations.

(v) *The maker or the person signing must be a certain person.* Where a person assigns it in an assumed name he is liable as a maker. A promissory note may be made by two or more makers, and they may be liable thereon jointly or severally according to its tenor. No two persons can be liable as makers in the alternative. Ordinarily, in a joint and several note

the makers promise jointly and severally to pay the money, but where a note runs "I promise to pay" and is signed by two or more persons, it is deemed a joint and several note. But if the note begins "we promise" and is signed by two or more persons, it is a joint note only. A partner may by a joint note bind the firm and himself severally.

(vi) *The promise must be to pay a certain sum*  
The following would be *bad notes* by reason of the uncertainty of the amount promised or directed to be paid :

(1) "I promise to pay B Rs 500, and all other sums which shall be due to him "

(2) "I promise to pay B Rs 500, first deducting thereout any money which he may owe me "

(3) "I promise to pay B Rs 10 on or before the 15th October, 1944, and a similar sum monthly every succeeding month "

(4) I promise to pay B Rs 1,000 within three years with interest at Rs 0/8/0 per cent per mensem but interest shall be paid annually and payee may recover the interest for any year by separate suit "

(5) "I acknowledge myself to be indebted to you for Rs. 500 and shall pay interest on the amount at Rs 12 per cent per annum" (Here there is no promise to pay the sum of money itself, there is a promise to pay interest only )

The sum, however, *does not become indefinite* merely because —

(a) there is a promise to pay compound interest;

(b) there is a promise to pay the amount with interest at a specified rate, or,

(c) the amount is to be paid at an indicated rate of exchange, or

(d) the amount is payable by instalments, even with a provision that on default being made in payment of an instalment the whole shall become due. Thus a promise to pay on demand a certain sum with 10 per cent. interest with quarterly rests is for a sum certain.

(e) No definite sum is mentioned in the instrument but a definite sum can be made out from the words used *e.g.* so many maunds at so many rupees per maund.

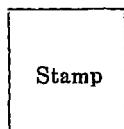
(vii) *The amount payable should be in money and money only.* "I promise to pay B Rs 500, and deliver to him my black horse on 1st January next;" is not a promissory note. But a note is not invalid merely because it contains also a pledge of collateral security with authority to sell or dispose it.

(viii) *The payee should also be certain.* A promissory note must contain a promise to pay to some person or to their order or to the bearer of the note. The note may be payable (1) to a particular individual or to individuals, or (2) to a particular individual or his order, or (3) to the order of a particular individual, or (4) generally to the bearer. An instrument payable to the Secretary of a club or a Manager of a bank or the Principal of a college is regarded as payable to a certain person. When an individual is mentioned although he is misnamed or designated by description only, it is of no importance if it be sufficiently clear who was intended.

(ix) *The 'promissory note' must be properly stamped—* As to what should be the proper stamp, reference may be made to a later chapter.

*Specimen Promissory notes*

New Delhi,  
December 27th, 1946

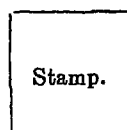


Rs 500/-

One month after date I promise to pay to  
Mr Joti Prashad the sum of Rs Five hundred only, value  
received

Jai Gopal

New Delhi,  
Decmeber 27th, 1946



Rs 200/-

On demand, we promise to pay Mr Ganesh  
Saha: the sum of Rs. 200 only, value received

Ram Chand  
Madan Gopal

New Delhi,  
December 27th, 1946



Rs 600/

Three months after date we jointly and seve-  
rally promise to pay Mr Mohan Lal or order the sum of Rs  
six hundred only, value received

Prem Chand  
Nand Gopal.



A promissory note in which no time for payment is specified is payable on demand

Section 25 of the Indian Paper Currency Act, 1913, *prohibits* issue of promissory notes, bills of exchange, hundis or engagement for the payment of money *payable to bearer on demand* or borrow, owe or take up any sums of money on the bills, hundis or notes payable to bearer on demand of any such person. Cheques or drafts payable to bearer on demand or otherwise may however be drawn on bankers, shroffs, or agents by their customers or constituents in respect of desposits of money in the hands of those bankers, shroffs or agents and held by them at the credit and disposal of the persons drawing such cheques or drafts. Section 26 of the Act makes the issuing of such bills and notes a criminal offence and prescribes the penalty

On this very ground a branch bank cannot issue a bank draft payable to bearer on any other branch or head office of the same bank

Since the establishment of the Reserve Bank of India, its Issue Department can issue such notes

*Ambiguous instruments*—Where an instrument may be construed either as a promissory note or bill of exchange, the holder may at his election treat it as either and the instrument shall be thenceforward treated accordingly.

### **Law as to promissory notes.**

The law as to bills of exchange applies to promissory notes, the maker of a note corresponding with the acceptor of a bill, and the first indorser of a note corresponding with the drawer of an accepted bill payable to the drawer's order

A promissory note, payable at a certain period after sight, must be presented to the maker thereof for sight, (if he can, after reasonable search, be found) by a person entitled to demand payment, within a reasonable time after it is made and in business hours on a business

day *In default of such presentment*, no party thereto is liable thereon to the person making such default

Where a promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof.

A promissory note payable by instalments must be presented for payment on the third day after the date fixed for payment of each instalment, and non-payment on such presentment has the same effect as non-payment of a note at maturity.

No notice of dishonour is necessary in the case of a promissory note which is not negotiable.

In the case of a promissory note there is no "drawee in case of need" or "acceptor for honour", and the rules, therefore, of relating to acceptance and payment for honour and reference in case of need, applicable to bills of exchange do not apply to promissory notes

## CHEQUES

### Cheque

A cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. The person who draws the cheque is known as the *drawer*, the bank on which the cheque is drawn is known as the *drawee* and the person to whom or to whose order the bank is directed to pay is known as the *payee*. If no *payee* is mentioned in the cheque, the bank must pay the bearer. A cheque is always payable on demand.

The following is the form which a cheque usually takes —

No. 67321, 27th December, 1946 In favour for Mr Madan Gopal for Rs 5,000/- Ram Chand.	No. 67321 The 27th December, 1946 IMPERIAL BANK OF INDIA (New Delhi Branch) Pay to Mr Madan Gopal or order Rs Five thousand only Rs 5,000—0—0 Ram Chand
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### Difference between cheques and bills.

Cheques in general are subject to the same laws and processes as bills of exchange, but with certain modifications and extensions. The following are the main *differences* between a cheque and a bill of exchange —

1 A cheque is always drawn on a bank. But a bill can be drawn on any person.

2. A cheque need not be accepted by the bank on which it is drawn before it is presented for payment. But a bill payable after sight must be accepted by the drawee before it is presented for payment. In default of such presentment the holder of the bill cannot make any party liable thereon.

3 A cheque is payable on demand but in the case of a bill a grace of three days after maturity is allowed in respect of payment

4. In the case of a bill the drawer is discharged from all liability to the payee if it is not presented within a reasonable time. But the drawer of a cheque is discharged from all liability to the payee only if the delay in presentment causes him loss and injury.

### Bearer cheque.

When a cheque is drawn as a bearer cheque it will always remain a bearer cheque notwithstanding any endorsement appearing thereon. When a cheque is originally expressed to be payable to bearer, the drawee is discharged by payment in due course to the

bearer thereof, notwithstanding any endorsement whether in full or blank appearing thereon, and notwithstanding that any such endorsement purports to restrict or to exclude further negotiation

### **Cheque payable to order.**

When a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due course

### **Drafts.**

Where any draft, that is an order to pay money drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand, purports to be endorsed by or on behalf of the payee, the bank is discharged by the payment in due course.

### **Crossed cheques.**

A crossed cheque is a cheque across the face of which two parallel transverse lines are drawn with or without the words "and company" or any abbreviation thereof or some other words the effect of which is that the banker on whom it is drawn shall not pay it otherwise than to a banker to whom it is crossed, or his agent for collection.

There are two types of crossing—"General" and "Special" A "*general crossing*" is defined as follows .

Where a cheque bears across its face an addition of the words "and company" or any abbreviation thereof between two parallel transverse lines or of two parallel transverse lines simply, either with or without the words "not negotiable", that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally

A "*special crossing*" is defined as follows .

Where a cheque bears across its face an addition of the name of banker, either with or without the words "not negotiable", that addition shall be deemed a cro-

ssing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker. Specimens are :

"The Imperial Bank of India"	The Imperial Bank of India Not negotiable"
"Imperial Bank of India, New Delhi Remitted for collection to Punjab National Bank Ltd"	"Punjab National Bank A/c payee only" "Imperial Bank of India, New Delhi A/c Punjab National Bank, Ltd, New Delhi"

*Crossing a cheque* - The following are the rules.

(a) A cheque may be crossed generally or specially by the drawer.

(b) Where a cheque is uncrossed, the holder may cross it generally or specially.

(c) Where a cheque is crossed generally, the holder may cross it specially.

(d) Where a cheque is crossed generally or specially the holder may add the words "not negotiable".

(e) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker, his agent, for collection.

If a cheque is crossed by the drawer he alone has the right to cancel the crossing by writing the words "pay cash" on the cheque under his full signature, *not his initials only*

A special crossing cannot either be altered or made a general crossing without the consent and the signature of the drawer.

*How cheque crossings operate*.— The first thing that a banker should do, when a cheque is presented to him for payment at the counter, is to see whether it is an open or a crossed cheque and if crossed, whether it is crossed generally or specially. If the cheque has been crossed generally, the holder should be asked to

present it through a banker, and if specially crossed, through the banker to whom it is crossed, or some other bank acting as agent for collection for the banker named. The following rules apply :

(1) Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker,

Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or his agent for collection.

(ii) Where cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof. If, however, a cheque is crossed to two different branches of a bank it would be considered as a crossing to a single bank, as the branches of a bank do not constitute two separate or distinct banks.

(iii) If the banker on whom a crossed cheque is drawn has paid the same in due course, that is, according to the above provisions, he may debit the drawer with the amount in his accounts with him. For paying that amount the banker cannot be charged either by the drawer or by any other person, even if the amount does not reach the true owner of the cheque.

*"Payment in due course"* also means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

(iv) Any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same is crossed, or his agent for collection, being a banker

shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

(v) A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment. For this purpose, a banker receives payment of a crossed cheque for a customer notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

(vi) It is to be noted that if the crossing is obliterated or is of a nature which cannot be noticed and the banker pays the same *in good faith* he will be protected. Payment thereof according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge the banker from all liability thereon; and such payment shall not be questioned by reason of the instrument having been altered, or the cheque crossed.

### **Not negotiable crossing.**

In the case of cheques crossed "generally" or "specially", and bearing in either case the words "not negotiable", the position would be that a person taking such a cheque shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had.

The effect of a 'not negotiable' crossing is to deprive the instrument of the special advantage which a negotiable instrument as such enjoys. The special advantage is, as we have seen, that the holder in due course of a negotiable instrument who receives it in good faith complete and regular on the face of it and without any notice as to any defect in title of a previous holder receives it free from all defences that may

be had against a previous holder or the drawer, as to a defect in title of the instrument.

It is a wrong notion to hold that "not negotiable" crossing of a cheque means that the holder of it cannot transfer it to any party and that such an instrument is payable to the holder alone. "The effect of adding the words not negotiable to a cheque is not to impede transfer, but to perpetuate in the hands of any transferee whatever defect or infirmity of title may affect the person who first transferred the cheque with those words on it." The transferee of a cheque crossed "not negotiable" does not acquire the rights of a holder by negotiation. His rights are those of an ordinary transferee of a chose in action. He gets no better title than that of his transferor. The object of non-negotiable crossing is to afford protection to the drawer or holder against miscarriage or dishonesty in the course of transit by making it difficult to get the cheque cashed until it reaches its destination.

### Open or uncrossed cheque

*Bearer cheques* — Banks ordinarily require the persons presenting bearer cheques for payment to indorse them. Although not legally bound to sign it, the holder of a bearer cheque generally raises no objection, probably because, if he refused to sign, the paying banker may insist upon having a properly stamped receipt for the amount paid to him. The paying banker can have no justification for asking for the identification of the holder of a bearer cheque, although in case of doubt, especially when the cheque presented for payment across the counter is for a large amount, he (the banker) may ask on the telephone, if possible, for the drawer's confirmation. In case of bearer cheques made payable to corporations presented for payment without any indorsement the paying banker would be well advised to make inquiries before paying them at the counter.

As already noted, a cheque once a bearer is always a bearer so that the drawee is discharged by payment in



due course to the bearer thereof, notwithstanding any endorsement whether in full or in blank appearing thereon and notwithstanding that any such endorsement purports to restrict or exclude further negotiation.

A negotiable instrument *indorsed in blank* is payable to the bearer thereof, even though originally payable to order. Where, therefore, a cheque originally drawn to order, becomes payable to bearer by an indorsement in blank, it is not necessary to insist on an indorsement of the instrument to obtain a transfer of the property therein. Where, however, a cheque bears an indorsement in blank followed by an indorsement in full, it becomes payable to or to the order of the last named indorsee and requires his indorsement before payment.

### Order cheques.

Indorsement of an order cheque is necessary unless the payee himself presents it for payment and even then, although the payee is not bound to indorse it, bankers in India generally require him to do so failing which the payee may be called upon to give a receipt for the amount paid to him and to stamp it when the amount exceeds Rs 20. Bankers in India generally ask for the identification of the payee or the indorsee of an order cheque who presents it for payment at the counter of the drawee bank.

The banker must see that the indorsement on order cheques are regular, otherwise, the payment made may not be regarded as payment made in due course. Where an indorsement happens to be in a language, such as Chinese, which the bankers in India are not expected to know, the paying banker can refuse the payment of the cheque, for verification or confirmation, but he should give the reason for postponement in appropriate terms.

Where a cheque bears an indorsement making the payment thereof subject to a condition, the banker

will be well advised not to make payment in respect of it until the condition is fulfilled

It is customary to treat cheques made out in the names of fictitious persons as bearer cheques, *e g* cheques payable to "Lord Krishna or order", or "Mother India or order" or "The Arabian Nights or order", or "The man in the Moon or order"

It is necessary that bankers should insist on the indorsements on the public functionaries concerned, whatever cheques are drawn in favour of local or other public bodies, whether in respect of cesses, taxes, or otherwise. Thus cheques payable to "The Federal Court of India or order", or "The University of Delhi or order" or 'The Delhi Government Treasury or order', will be indorsed by the Chief Justice of the Federal Court or other officer thereof, duly authorized in this behalf, or as in the case of the "University of Delhi or order" by the Vice-Chancellor of the University or the Registrar if authorized in this behalf and in the case of the "Delhi Government Treasury or order" by the Treasury Officer concerned

*Proper indorsements* The guiding principles are :

(i) An indorsement should be in the form of ordinary signature of the payee or indorsee. Complimentary prefixes, suffixes and other courtsey titles do not form parts of indorsements, although in certain foreign countries courtsey titles are included in indorsements

(ii) Where the name of the payee, or indorsee, is *spelt incorrectly*, the spelling of the indorsement must correspond with that of the mis-spelt name, but if the payee wishes, he may add his correct name in brackets.

(iii) In the case of a *spinster or unmarried woman* the indorsement will consist of her first name and surname. Thus Miss Usha Rani will indorse as Usha Rani. The abbreviation "Miss" before a name is

regarded as a term of courtsey as well as a term of description, and consequently differs from the abbreviations "Mr." or "Esq.". If, on the other hand, the payee happens to be a married woman, as in the case of a cheque made payable to Mrs. Cecil Jones, she should indorse it by name followed by words showing that she is the wife or widow of Mr. Cecil Jones, as K. Jones, wife or widow of Cecil Jones. In case the payee's name is given as "Mrs. Jones" she should indorse with her usual signature, "Katherine Jones" or "K. Jones", preferably the former. When a cheque is made payable to a married woman in her maiden name, she should indorse the cheque by giving her christian or first name, followed by her husband's surname, with the word "nee" (born as, formerly) and her maiden surname. Thus, a cheque made payable to Miss Katherine Jones, now married to Mr. Robinson, should be indorsed Katherine Robinson nee Jones.

(iv) In the case of *illiterate persons*, the left hand thumb mark should be impressed and witnessed, and the witness should be required to give his or her address. If, however, a bearer cheque payable to A, who is illiterate is indorsed in favour of B with A's thumb impression, and B happens to be known to the paying banker, it is not necessary to verify the thumb impression of A, as the cheque is payable to bearer.

(v) In the case of *ordinary partnership firm* where the indorsement is in the name of the firm, it will be regarded as a valid indorsement of a cheque made out in that name, to be signed by proprietor, partner, or manager.

(vi) Cheques made payable to *two or more payees*, not being in partnership, must be indorsed by each of them individually. The banker will be justified in returning for confirmation, a cheque on which both the indorsements appear to be written by the same hand, or unless one of them has died and the banker has notice of his death or unless one of them

is authorized to sign on behalf of all, and the banker is apprised of the authority thus given

(vii) When the cheque is made payable to a *club, association or other institution*, the name of the payee is generally followed by the name and designation of the office bearer indorsing the instrument on behalf of the payee, as the mere signature of the person is no indication of the representative capacity in which he receives payment. If the instrument is made payable to the holders of an office without specifying their names as, for example to, "The Honorary Secretaries, the Sydenham College Students' Association", the indorsement must include not only the signatures of the persons holding the position but they should be followed by also their designation. If, on the other hand, the cheque is made payable to him personally, although the money is intended for the club or institution, it is enough if he indorses it with his name only.

(viii) The mere writing or impressing of the name of the *company* by a person acting under its authority constitutes a valid indorsement, but bankers do not accept such indorsements as good discharge, unless they are confirmed, or unless the authority and the capacity of the person signing the instrument is clearly indicated. Ordinarily, these are holders of certain offices in a company who are in a position to bind the company. For instance, bankers accept indorsements made by directors, managers and secretaries of companies, but not those of cashiers, accountants, and ledger clerks. For a valid discharge, an indorsement on behalf of a company should correspond as in other cases exactly with the name of the company, as given on the cheque or bill, and when the name given is inaccurate, the indorsement should correspond to the inaccurate name.

(ix) There is no legal compulsion on a banker to accept an indorsement with the words "*per pro*"

(per procuration) without confirmation. The signatory to *per pro* indorsement must give his full ordinary signature. A paying banker is considered to run no risk if he pays a cheque purporting to be indorsed by a duly authorised agent of the payee, and he will not be liable if it turns out that the person so indorsing had gone beyond his authority. In England dividend warrants are not paid on *per pro* indorsements. Such indorsements are generally accepted in India when dividend warrants, not being in the form of cheques, are drawn payable to more than one payee and indorsement by any one of them is considered sufficient, the payee so indorsing has to give his full name as given in the body of warrant.

(x) In the case of cheques in the names of *public authorities and corporations* such as port trusts, improvement trusts and municipalities, the indorsements should be for the respective body and the indorser should add his or her designation

(xi) Cheques made payable to *deceased persons* must be indorsed by their legal representatives. As executors can delegate their authority, there is no objection if any one of them signs. He must, however, indicate that he is an *executor* and that he signs on behalf of himself and his co-executor or co-executors. Although authority to sign may be given to one executor by his co-executors, it cannot be placed in the hands of an outside person. All trustees must sign, while any executor can indorse.

### **Liability of drawee bank of cheque.**

The drawee of a cheque having sufficient funds of the drawer in his hands, properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default.

A bank, however, in its own interest must

satisfy itself that a customer has sufficient balance to meet a cheque before it pays it. It is usual for a bank to give an important customer the opportunity of paying in money to meet a cheque before sending it back, but it is under no obligation so to do, on the other hand, the presentation of a cheque with no funds to meet it is equivalent to an application for a loan and the bank may exercise its discretion in paying it and treat the resulting debit balance as an overdraft.

### **Presentation of cheques**

A cheque must, in order to charge the drawer, be presented at the bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer. So, if the bank on which the cheque is drawn remains solvent, the drawer remains bound after presentment and refusal although months and years (short of the period of limitation) have elapsed since the drawing. If before presentment the bank fails, the loss will not be that of the drawer, but will fall upon the holder himself, subject of course, to the following rule.

Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or person on whose account it is drawn had the right, at the time when presentment ought to have been made, as between himself and the banker, to have the cheque paid and suffers actual damage through the delay he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of the banker to a larger amount than he would have been if such cheque had been paid. In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. The holder of the cheque as to which such drawer or person is so discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of

such discharge and entitled to recover the amount from him.

A draws a cheque for Rs. 1,000/-, and, when the cheque ought to be presented, has funds at the bank to meet it. The bank fails before the cheque is presented. The drawer is discharged, but the holder can prove against the bank for the amount of the cheque

A draws a cheque at Umballa on a bank in Calcutta. The bank fails before the cheque could be presented in ordinary course. A is not discharged, for he has not suffered actual damage through any delay in presenting the cheque

A cheque must, in order to charge any person except the drawer, be presented within a reasonable time after delivery thereof by such person.

### **Discharge of drawee.**

Where a cheque payable to order purports to be indorsed by or on behalf of the payee, the drawee is discharged by payment in due course

As already noted, the main requisites of '*payment in due course*' are

(i) that the payment should be made in accordance with the apparent tenor of the instrument, that is, in accordance with the intention of the parties as it appears on the face of the instrument,

(ii) that such payment should be made in good faith and without negligence, and

(iii) the person to whom such payment is made should be in possession of the instrument under circumstances which do not offer a reasonable ground for believing that such person is not entitled to receive the amount thereof

Payment of a *post-dated cheque* cannot be regarded as payment in due course. If the paying banker honours a post-dated cheque before its ostensible date, he will not be entitled to the statutory protection

should the indorsement of the payee transpire to have been forged, on the other hand, he may become liable to pay damages as explained above.

Similarly, if the paying bank fails to see whether or not all the indorsements are regular, it will be deprived of the statutory protection. In case of *per pro* indorsement, if the paying banker does not satisfy himself whether a person signing *per pro* has any authority or not, the payment will not be regarded as payment in due course.

The third requirement is that the person to whom payment is made, should not only be in possession of the instrument, but further there should be no such circumstances connected with his possession as afford a reasonable ground for believing that he is not legally entitled to receive payment of the amount mentioned therein. Possession of a cheque, for instance, the payment of which has been *stopped* by the drawer, is not such possession as complies with this requirement of "payment in due course".

Before payment the banker should make himself sure on two points. (1) whether the cheque purports to bear the signature which the banker has been instructed to honour, namely, that of his customer, or of the customer's agent duly authorised in his behalf, and (2) whether the signature on the cheque is genuine? In the case of *joint accounts* in the absence of clear instructions from each of the parties concerned, the banker should safeguard himself by insisting upon the cheque being signed by all the parties to a joint account. The same rule applies to cheques drawn against a joint account in the names of *husband and wife* unless the banker is authorised to honour cheques signed by either of them. Where an account is opened in the name of *firm* consisting of say two parties, with instructions that cheques to be drawn on the firm's account must bear the signature of one partner and the initials of the other, the banker who honours a



cheque drawn by one partner but without the initials of the other, is liable to the second partner for the amount of the cheque

A banker cannot debit his customer with the amount of a cheque which has been paid by him to a person claiming under a *forged signature*. A banker is supposed to have specimen signatures of all persons authorised to draw on him, so that he can compare the signature on the cheque with the specimen supplied to him. Should he come to the conclusion that the drawer's signature on a cheque differs from the specimen signature supplied to him, he should not honour it. In case, however, the signature is forged cleverly and he fails to detect the forgery, he cannot debit his customer's account with the amount of the cheque. But, if by his conduct the customer causes the banker to believe the signature to be genuine, the banker will be entitled to debit the account of the former with the amount of the cheque paid.

*Drafts drawn by one branch of a bank on another payable to order* · Where any draft, that is an order to pay money drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand, purports to be endorsed by or on behalf of the payee, the bank is discharged by the payment in due course

### **Marking of cheques.**

Circumstances sometimes arise where the drawer of a cheque requires some evidence that the cheque will be duly honoured on presentation, in order to meet the requirements of the person to whom he is tendering the cheque in payment of a debt. In such cases, he can request the drawee bank to "*mark*" the cheque for payment and thus it does, if the cheque is in order and funds are available, by writing the word "good" across one corner of the cheque, adding the bank's stamp and the initials of the bank's cashier.

The object and effect of a bank's marking che-

ques at the instance of the customer is to further the ready acceptance of the instrument by affording evidence on the face of it that it is drawn in good faith, and that there are funds sufficient and available to meet it, and as adding the credit of the drawee bank to that of the drawer. If the cheque is marked at the instance of the drawer or the customer, the drawer will have no right of countermanding payment without holding himself liable to indemnify the banker for any loss he suffers through his having marked the cheque, the payment of which is now stopped.

If the holder presents the cheque and procures it to be certified or the banker promises to place it to his credit or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit as equivalent to an actual payment, the effect is the same, as if he had received the money in cash, and the banker's indebtedness to him is equally full and irrevocable. The same is the result if money is paid into the bank by the drawer of the cheque to meet a particular bill and the bank assents to the same, the holder may sue the bank for the amount.

A cheque so 'marked' acquires, in effect, a status as good as if it were issued by the drawee bank itself. Cheques will rarely be "marked" by the drawee bank at the request of the payee or a subsequent holder. The drawee bank should comply with such requests only on the written authority of the drawer. Should it "mark" any such cheque without such authority, the drawee bank might find himself unable to charge the account with the cheque when eventually presented by insufficiency of funds or payment being stopped by the drawer, or a legal bar to the operation of the account having arisen, and it would have no authority to "earmark" the necessary funds on the account at the time of "marking." Moreover, the practice of ear-marking funds to meet marked

cheques is not universal with all banks, and it is difficult to say what is the exact liability of a bank which has marked a cheque without knowing what entries it has made in its books. By custom between banks, the practice of "marking" as good for payment cheques which have been received too late to be passed through the usual clearing channels, is generally recognised, and the right of the drawee bank to regard a cheque which is obviously intended to be presented for payment immediately, as being "marked" under the authority of the drawer would probably be upheld by the courts.

In all cases where the "marking" of a cheque is requested, the safest method is for the drawee bank to issue its own cheque or "banker's draft" in exchange, and thus acquire the right to charge the account with the cheque at once, as if it had been paid in the ordinary course.

*Bank pass-books.* Where a customer sends to his banker a cheque drawn on him for realisation, he constitutes the banker his agent for collection; and if the banker credits him with the amount of the cheque in the pass-book delivered to the customer, that will be taken to be an acknowledgment by the bank that they are the debtors of the customer for the amount, but the banker may, however, prove that the entry was made under a mistake, unless, in the meanwhile, the customer had acted on the representation of the bank, so as to change his position, in which case the bank will be estopped from contending that it is not liable. The entries in the pass-book cannot, however, be treated as a settlement of account between the parties, nor is there any duty cast on the customer to examine the pass-book from time to time. Whether a customer may not be estopped from challenging the entry can be decided only by his conduct such as knowledge, refraining from communicating with the bank about items not chargeable against him. An entry in a pass

book is not in all cases conclusive and binding on the bank nor on the customer, although the customer in whose favour the entry stands starts with the advantage, that *prima facie* it is an admission by the bank in his favour which cannot in certain cases be rebutted

### When payment of cheque must be refused

The duty, as well as the authority of the banker, to pay cheques drawn upon him is determined:—

(1) *By the countermanding of payment by the customer* The instructions for the payment of money conveyed to the drawee bank by a cheque can be countermanded by the drawer at any time prior to the moment when the cheque is actually paid. Such an order is known as “stopping payment” of the cheque, but it can be given only by the drawer and it must be in writing, giving exact details of the cheque to be “stopped”, such as the number of the cheque, the amount and the payee, and must be signed by him with his usual signature. Where instructions to stop payment of a cheque are given by telephone or telegram, and so cannot be properly authenticated, they should be confirmed in writing by the drawer at the earliest possible moment. If the cheque is presented for payment before the receipt of the written confirmation, it should be refused payment with the answer “payment stopped by telegram (telephone) Awaiting confirmation”. When the true owner of a cheque advises the drawee bank that it has been *lost* or *stolen*, the drawer should at once be advised, either by the bank or by the true owner, and his written instructions to stop payment of the cheque should be obtained as soon as possible. If the cheque is presented for payment before the drawer's instructions to stop payment are received, the bank should endeavour to postpone payment. This it can do where the cheque was made payable to order and was lost by the payee before he endorsed it, by refusing payment with the answer, “Payee states cheque lost or stolen, Endorsement

requires confirmation". If, however, the cheque was originally payable to bearer or has been endorsed in blank and so become payable to bearer, the drawee bank, failing instructions from the drawer to stop payment, may be compelled to effect payment if the title of the holder is apparently in good order, and the cheque is presented before receipt of the drawer's instructions to stop payment.

Should the drawee bank pay a cheque of which it has received proper notice to stop payment, it cannot debit the customer's account with the payment; neither can it recover the amount from the person to whom it was made, unless that person had no title to the cheque or acted without good faith, otherwise the bank must bear the loss.

As regards the answers to be given in case of cheques duly stopped, it is necessary to avoid the use of words like "Payment stopped" As such words might be interpreted to mean that the drawer has become insolvent or the drawee had suspended payment, the proper answer should be 'orders not to pay' or "payment countermanded by the drawer"

*Lost cheques.* As has been stated above, where a cheque has been lost or stolen, the drawee bank and the drawer should be asked to stop payment. Other parties to the cheque should also be notified of the loss. Where a cheque is lost before it has been in circulation for an unreasonable time, the holder can demand the issue of another cheque by the drawer in identical terms, provided that he furnishes the drawer with a satisfactory indemnity against any claims which may be made by third parties in respect of the lost instrument should it be found again. The loss of a cheque, however, as in the case of a bill of exchange, is no bar to an action brought in respect of it, provided that the holder furnishes an indemnity satisfactory to the court against the claims of third parties.

*Cancellation of cheques:* Cancellation of a

cheque may be effected by destroying the cheque, or by tearing it in pieces, or by cancelling the drawer's signature, or by marking it across the face in such a way as to make obvious the cancellation. Intentional cancellation of a cheque by a holder discharges the instrument, and the drawer and prior indorsers are freed from their liability. If a cheque is cancelled unintentionally or without authority, as, for instance, where the paying cashier of the drawee bank cancels the drawer's signature and subsequently finds that the cheque ought, for some reason, to be refused payment the cancellation is inoperative unless it has already been completed by notification, either express or implied, to some other person who has acted upon such notice.

Where a cheque has been unintentionally cancelled or accidentally damaged, the party responsible should write against such cancellation, or should repair the damage and write over the repair, the words "Accidentally cancelled (or mutilated)", "Cancelled in error", adding his full signature.

(2) *Upon receipt of a notice of customer's death*—Upon the death of a customer, the title to his bank balance passes to his legal representative. If, however, the banker is unaware of the death of his customer, he may honour a cheque drawn by that customer and debit his account with the amount, notwithstanding that payment has actually been made after the death of his customer.

(3) *By customer's insolvency* A bank can safely honour the cheques of his customer and can also deliver up any securities belonging to him, so long as the banker has no notice of the presentation of an insolvency petition against the customer, or until the receiving order is made against him. Until an order of adjudication is made against the debtor either on his petition or that of his creditors, his property remains vested in him. After the order of adjudication is made,

the property of the insolvent vests in the official assignee in presidency towns and in the official receiver in the mofussil, when it is not open to the debtor to deal with his property, and the banker should then refuse to honour insolvent customer's cheques

(4) *Upon receipt of a notice of the insanity of a customer :* Should the customer become absolutely insane or of unsound mind, the banker should not honour his cheques; but payment of a cheque, drawn at a time when the customer was capable of acting rationally, is valid.

(5) By garnishee or other legal order attaching or otherwise dealing with customer's money in the custody of the banker.

(6) On receipt by the banker of notice of assignment by the customer of the credit balance of his account

(7) In case of trust account knowledge that the customer intends to use the funds in breach of trust, is a sufficient reason for refusing payment of the cheques.

(8) On knowledge of any defect in the title of the party presenting the cheque

### Answers in case of dishonoured cheques

When a banker decides not to honour a cheque, he should return it with a slip, giving the reason for the dishonour. There is no statutory obligation upon a banker to give a written answer on a cheque he decides to dishonour. The rules of Bankers Clearing Houses generally require, however, that no unpaid article can be accepted back unless it bears a written answer. As regards cheques presented over the counter although there is no legal obligation to give in writing the reason for non-payment bankers generally attach to the unpaid cheque a printed slip and mark the particular number of the appropriate answer. The custo-

mary reasons for the refusal and the answers given, and their abbreviations, are —

*"Refer to Drawer"* (R/D) This answer is given, when sufficient funds are not available on the account, and it is not desired to disclose the fact, or when payment has been stopped and it is not desired that the presentor should be warned of this, or if the account has been closed or is non-existent. Alternative answers in the above cases are

*"Not sufficient"* (N/S), Where the available balance will not cover the amount of the cheque presented, but the bank must never disclose the amount of the deficiency, and must never make part payment of the cheque.

*"Effects not cleared"* (E N C), showing that the available balance is at the time insufficient, but that certain articles are in course of collection which might eventually permit of the cheque being honoured (where a bank does not allow a customer to draw against items paid in until they have been cleared, it is a mark of want of confidence in the customer), it is often the practice to add to this answer the words "present again," or "please re-present" and a dishonoured cheque may be represented as often as is thought necessary

*"Payment stopped"* or any similar answer *"account closed"* or *"no account"* all speak for themselves, as do *"drawer deceased"* *"drawer in liquidation"* and *"partnership dissolved"*. The answer *"refer to drawer"* is most properly used when the account has been *garnished*.

*"Words and figures differ"* is an answer of which the cause needs no explanation, and the cheque will require to be put in order by the drawer. A trifling error in the actual marking out of the cheque, such as where the wording reads, "twenty-three eight shillings and four pence" and the figures are £ 2384, would



usually be passed by the drawee of the cheque

"*Cheque mutilated*" is the answer given on a cheque which has been torn across some material part, such as the amount or the drawer's signature, and rejoined badly or not at all. The paying bank will usually require the confirmation of the presenting bank or of the drawer in such cases.

"*Drawer's signature differ*" is the answer given when the signature to a cheque does not correspond with that in the signature book of the customer whose signature it purports to be, but the bank has no reason to assume that it is a forgery.

The answers "*post dated*," "*out of date*", "*indorsement irregular*" and *first* (or second or third etc.) *indorsement missing*", are self explanatory. In the last two cases, the words "will pay under banker's confirmation" are usually added, and this answer is also applied to articles bearing in indorsements in foreign characters. Any cheque in which a material alteration appears to have been made should be returned with the answer "*alteration in* (payee's name, or amount, or date etc.) *requires drawer's signature*."

Any special circumstances will call for a special answer, as, for example in the case of a cheque crossed specially to two banks, one not being the agent of the other

Where *several cheques* are presented simultaneously for payment, as though a clearing house, and the available funds are insufficient to meet them all, the paying bank will pay as much money as possible and refuse payment of the others. Payment is made in the order in which the cheques are numbered and dated, but the bank may decide to protect the customer's credit to the fullest possible extent by paying the largest number of cheques whose total is covered by the available funds.

## GENERAL

**Capacity of parties to negotiable instrument.**

Every person capable of entering into a contract according to the law to which he is subject, may bind himself and be bound by the making, drawing acceptance, indorsement, delivery and negotiation of a promissory note, bill of exchange or cheque. All persons, therefore, who are disqualified from entering into a contract such as minors, persons of unsound mind or alien enemies would not be capable of being parties to a negotiable instrument.

*Minors*—A minor may draw, endorse, deliver and negotiate a negotiable instrument so as to bind all parties except himself. That is, a minor is not prohibited from being a party to a negotiable instrument, but he cannot be made liable as a party to a negotiable instrument. But a negotiable instrument drawn or indorsed by a minor is nevertheless valid and all parties to the instrument excepting the minor remain liable on the instrument to the holder for the time being. A minor cannot however accept any negotiable instrument nor can he execute a promissory note.

*Persons of unsound mind*—A bill or promissory note executed by a person of unsound mind whether a lunatic or a drunken person or a person who is incapable of forming a rational judgment as to the effects of such bill or note due to extreme old age or infirmity, is not binding on such person. Such a person cannot also draw, indorse, deliver and negotiate a negotiable instrument so as to bind all parties except himself.

*Alien enemy*—A contract with an alien enemy is void as contrary to law or public policy. Therefore a person cannot draw a bill of exchange upon the citizen of another country at war with his own country nor can he accept a bill drawn by an alien enemy or indorse a bill or note to such an alien enemy or be an endorsee from him.

*Insolvent*—On the insolvency of a person any negotiable instrument of which he may be a holder vests in his assignee but where an insolvent has no beneficial interest in a negotiable instrument, the title to such instrument does not vest in his assignee and he may endorse a negotiable instrument accepted for his accommodation so as to make the acceptor liable to the endorsee. An insolvent cannot sue on a negotiable instrument nor can he pass title to such instrument by endorsement or otherwise. But if he endorses an instrument to any bona fide holder without notice, such bona fide holder acquires a valid title to the instrument so endorsed to him.

*Corporations*—A corporation or company being a legal person can be a party to a negotiable instrument provided it is authorised expressly by its memorandum to do so. But even in the absence of express authority given by its memorandum a corporate body may execute, endorse or accept a negotiable instrument if it is necessary and incidental to the purpose for which it was created. Such would be the case in the case of ordinary trading concerns.

If a corporation, however, exceeds its power and executes an instrument, such an instrument is void and even a bona fide holder for value cannot make the corporation liable; for all persons dealing with a corporation are bound to ascertain its capacity to execute such an instrument. But where the power to execute instruments is given to a company by its memorandum, a person dealing with the company is not bound to enquire whether the procedure or the rules prescribed for executing such instruments by the articles have in fact been complied with. Thus where by the Articles of Association the directors of a company were empowered to authorise one of themselves to draw a bill of exchange for the company, and the managing director drew a bill without express authorisation, it was held that the company was nevertheless

liable to the holder of the bill as the holder was entitled to presume that the managing director had been authorised in due course.

**Lost or stolen instruments and instruments obtained by fraud or unlawful consideration**

When a negotiable instrument has been lost or has been obtained from any maker, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or indorsee who claims through the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder or from any party, prior to such holder, unless such possessor or indorsee is, or some person through whom he claims was, a holder thereof in due course

*Lost instruments*

(1) When a bill or note is lost, the finder acquires no title to it as against the rightful owner, nor can he claim payment from the acceptor or maker. The rightful owner is entitled to get the instrument back from the finder.

(2) When the finder of a lost bill or note gets payment from the acceptor or maker, who pays it *in due course*, such acceptor or maker is discharged from all liability to the rightful owner. But the rightful owner can always recover the money so paid to the finder.

(3) When a bill or note, which is payable to bearer or which is indorsed in blank, and is, therefore transferable by mere delivery, is lost, any bonafide transferee for value, without notice of the loss acquires a valid title to it and he can retain the instrument as against the rightful owner and is also entitled to payment from parties liable thereon.

(4) When the finder of a lost bill or note which is payable to order and is therefore transferable by indorsement and delivery, forges the instrument and

indorses it to a *bona fide* transferee for value, the latter will not acquire any title to it for the indorser himself had no title which he could transfer, and forgery can confer no title.

(5) When a holder loses a bill he should notify all parties liable thereon about the loss.

(6) When a holder loses a bill he must apply to the drawee for payment in maturity and if the drawee refuses, he must give notice of dishonour to all the parties liable. Otherwise he will lose his remedy against the drawer and all the prior parties.

*Stolen instruments.*—A person who steals a negotiable instrument from the rightful owner can always recover the instrument or the money if he has realised it from the drawee. But if he indorses it to any transferee for value who has no notice of the theft, such a *bona fide* transferee will acquire a good title not only against the thief but also against all the parties prior to him, provided the instrument was payable to bearer and as such transferable by mere delivery.

*Instrument obtained by fraud* — A contract becomes voidable for fraud. So if maker or the acceptor who is primarily liable for payment proves that the consideration for the instrument was vitiated by fraud, then the person defrauding is not entitled to recover. A bill is affected with fraud when the issue or any subsequent negotiation of it is obtained by fraud or in breach of faith. In such a case the holder of the instrument subsequent to the fraud cannot enforce payment against any party thereto, nor can he retain the bill against the true owner.

In the same way any holder or indorsee who claims though the person who obtained the instrument by fraud, cannot claim payment from any party liable thereon. It should be noted that the party which alleges fraud against the holder must prove it, as the presumption of law is that a holder is a holder in due course,

*Instruments obtained for an unlawful consideration* A note, bill, or cheque which is drawn for an unlawful consideration or for an unlawful object is void. In such a case the holder cannot recover any payment from any party liable on the instrument

*Forged instruments*—Forgery is the fraudulent making or alteration of a writing to the prejudice of another man's right. The most common species of forgery is fraudulently writing the name of an existing person. It is also a forgery to sign the name of a fictitious or non-existing person, intending it to be believed that the instrument was signed by a real person, if the signature be placed with a fraudulent or dishonest intention. The person who forges an instrument cannot confer a valid title even on a *bona fide* transferee for value without notice of the forgery. If the holder obtains payment on the forged instrument, the rightful owner can recover the money from him and the person who has paid the instrument can also be sued alternatively by the rightful owner for payment. For example, on a bill for Rs 1000/-, A's acceptance to the bill is forged. The bill comes into the hands of B a *bona fide* holder for value. B acquires no title.

Where indorsement of an instrument is forged a *bona fide* transferee for value acquires no valid title where the instrument is payable to order and hence can be negotiated only by indorsement and delivery. But a *bona fide* transferee for value acquires a valid title where the instrument is payable to bearer and as such can be negotiated by mere delivery even though the indorsement is forged. He can retain the instrument as against the rightful owner and can enforce payment from any party liable thereon.

### **Maturity of negotiable instruments**

The following rules apply—

(1) The maturity of a promissory note or bill of exchange is the date at which it falls due. *Three days of grace* are allowed after the day on which a bill or note

is expressed to be payable, except in case of such bills and notes which are in effect payable on demand, at sight or on presentment. If a bill or note is payable in *instalments*, it is entitled to days of grace on each instalment, as the instrument is in effect so many instruments in one. Days of grace are calculated by excluding the day on which the amount under the instrument is expressed to be due. Again, the days of grace are all counted consecutively and in direct succession, without any deduction or allowance for holidays between the first and the last day of grace.

(2) In calculating the date at which a promissory note or bill of exchange, made *payable a stated number of months* after date or after sight, or after a certain event, is at maturity, the period stated shall be held to terminate on the day of the month which corresponds with the day on which the instrument is dated, or presented for acceptance or sight, or noted for non-acceptance or protested for non-acceptance, or the event happens, or where the instrument is a bill of exchange made payable a stated number of months after sight and has been accepted for honour, with the day on which it was so accepted. If the month in which the period would terminate has no corresponding day, the period shall be held to terminate on the last day of such month.

Thus, a negotiable instrument, dated 29th January, 1946, is made payable at one month after date. The instrument is at maturity on the third day after the 28th February, 1946.

A negotiable instrument, dated 30th August 1946, is made payable three months after date. The instrument is at maturity on the 3rd December, 1946

A promissory note or bill of exchange, dated 31st August, 1946, is made payable three months after date. The instrument is at maturity on the 3rd December, 1946.

(3) In calculating the date at which a promi-

ssory note or bill of exchange made payable a certain number of days after date or after sight or after a certain event is at maturity, the day of the date, or of presentment for acceptance or sight, or of protest for non-acceptance, or on which the event happens, shall be excluded

(4) When the day on which a promissory note or bill of exchange is at maturity is a *public holiday*, the instrument shall be deemed to be due on the next preceding business day

The expression "public holiday" includes Sundays, New Year's day, Christmas day. if either of such days falls on a Sunday, the next following Monday Good Friday, and any other day declared by the Central Government, by notification in the Official Gazette, to be a public holiday

### Rules as to compensation

The compensation payable in case of dishonour of a promissory note, bill of exchange or cheque, by any party liable to the holder or any indorsee, is determined by the following rules —

(a) the holder is entitled to the amount due upon the instrument, together with the expenses properly incurred in presenting, noting and protesting it,

(b) When the person charged resides at a place different from that at which the instrument was payable, the holder is entitled to receive such sum at the current rate of exchange between the two places,

(c) an indorser who, being liable, has paid the amount due on the same is entitled to the amount so paid with interest at six per centum per annum from the date of payment until tender or realization thereof, together with all expenses caused by the dishonour and payment,

(d) when the person charged and such indorser reside at different places, the indorser is entitled to re-



ceive such sum at the current rate of exchange between the two places;

(e) the party entitled to compensation may draw a bill upon the party liable to compensate him, payable at sight or on demand, for the amount due to him; together with all expenses properly incurred by him. Such bill must be accompanied by the instrument dishonoured and the protest thereof (if any). If such bill is dishonoured, the party dishonouring the same is liable to make compensation thereof in the same manner as in the case of the original bill.

### **Conflict of laws**

The following rules apply :—

(I) In the absence of a contract to the contrary, the liability of the maker or drawer of a *foreign* promissory note, bill of exchange or cheque is regulated in all assential matters by the law of the place where he made the instrument, and the respective liabilities of the acceptor and indorser by the law of the place where the instrument is made payable.

A bill of exchange was drawn by A in California, where the rate of interest is 25 per cent, and accepted by B, payable in Washington, where the rate of interest is 6 per cent. The bill is indorsed in British India and is dishonoured. An action on the bill is brought against B in British India. He is liable to pay interest at the rate of 6 per cent. only; but, if A is charged as drawer, A is liable to pay interest at the rate of 25 per cent.

Where the document executed in Hyderabad State was not stamped as required by the laws of that State, and it was found that it was not admissible in evidence even after payment of penalty under the law in the Nizam's Dominions, it has been held that as the foreign statute does not make the contract void, but only makes it inadmissible in evidence the note can be sued upon in British India. Similarly, an unstamped promissory note executed to the Nawab of Rampur, which under the

statute of that State does not require to be stamped as a document in favour of the State, need not be stamped and can be sued upon in British India

(ii) Where a promissory note, bill of exchange or cheque is made payable in a different place from that in which it is made or indorsed, the law of the place when it is made payable determines what constitutes dishonour and what notice of dishonour is sufficient.

A bill of exchange drawn and indorsed in British India, but accepted payable in France, is dishonoured. The indorsee causes it to be protested for such dishonour, and gives notice thereof in accordance with the law of France, though not in accordance with the rules in India in respect of bills which are not foreign. The notice is sufficient.

(iii) If a negotiable instrument is made, drawn, accepted or indorsed out of British India, but in accordance with the law of British India, the circumstance that any agreement evidenced by such instrument is invalid according to the law of the country wherein it was entered into does not invalidate any subsequent acceptance or indorsement made thereon in British India,

(iv) The law of any foreign country regarding promissory notes, bills of exchange and cheques shall be presumed to be the same as that of British India, unless and until the contrary is proved.

## HUNDIS

### Hundis

Hundis are negotiable instruments written in the vernacular languages of India. They are, most frequently, like bills of exchange in form and substance issued for the purpose of financing trade or for

raising loans But they are also like promissory notes sometimes.

Hundis have been in existence in India from time immemorial and special customs and usages have been built up in respect of dealings in hundis. The Negotiable Instruments Act has not touched these customs and usages though in some important points the provisions of the Act differ considerably from such usages and customs. Thus, oral acceptance of a hundi may be recognised by courts of India if there is a local custom to that effect although the Act definitely lays down that acceptance must be in writing. Courts in India will not also insist on the notice of dishonour being given by the holder if local customs so justify although it is imperative under the Act. Hence, although hundis are not mentioned as negotiable instruments by the Act, they circulate freely as such by force of custom and usage. The rights and duties of parties in *hundis* are also strictly regulated by such custom and usage. But the Act lays down that the parties to a hundi may exclude the operation of such custom and usage by any words in the hundi indicating an intention that the legal relations of the parties shall be governed by the Negotiable Instruments Act.

### Kinds of hundis.

Hundis are mainly divided into two groups.—

- (1) *Darshani* hundis i. e. hundis payable at sight, and
- (2) *Muddati* or *Miadi* hundis, i. e. hundis payable after sight or a certain time after presentment.

Darshani hundis and Muddati or Miadi hundis are again subdivided into several classes, some of which are as follows:—

- (1) *Shahyog Hundi*:—It is a hundi drawn by a merchant on another merchant directing the latter to

pay the hundi to a holder who must be *shah*, i.e., a man of substance and respectability. The drawee must take proper cautions to ascertain the respectability of the holder before he makes payment to him. Otherwise the drawee will not be entitled to recover the money he pays out to the holder if the holder turns out to be not respectable. This type of hundis is most commonly used for the purpose of remitting money *eg* A comes to B for the purposes of remitting Rs 1000/- to C. He deposits the money with B whereupon B draws a *Shahjog hundi* on X directing him to pay Rs 1000/- to a shah. A may send the hundi to C straightaway for C to realise the money from X. It is very rarely presented to the drawee for acceptance and most commonly it is presented for payment forthwith at the time of payment. It usually states the name of the person for whom it is drawn or who has deposited the money with the drawer. It may be either a *Darshani* or a *Miadi* hundi. It can be negotiated by mere delivery.

A minor may be the holder of a *Shahjog hundi* and a payment to him will certainly be recognised. An indorsement "for realisation" of a *Shahjog hundi* is in nature of a restrictive indorsement which gives the indorsee only the right to receive payment and sue the acceptor if not paid, but not to transfer his rights as an indorsee to anybody else.

(2) *Nam Jog Hundi* :- It is payable to a specified person whose name is written on the face of the hundi. It differs from a *Shahjog hundi* in that it cannot be paid to anyone except the person who is specified or who has obtained the hundi from such a specified person by indorsement.

(3) *Dhani Jog Hundi* :- It is payable to anyone who presents it, i.e., by any holder. It can, therefore, be negotiated as 'an instrument' payable to bearer. (*Dhani* means a holder)

*Firman Jog*: It is made payable to the order of

a person. (Firman means an order).

*Dekhandar*.— It is also payable to bearer or presenter,

*Jokhmī Hundi*.—It is mostly used by merchants as a means of insuring goods which they send to their customers or agents. For example, A in Calcutta consigns certain goods to B in Bombay. B may be either his agent or customer. A then draws a hundi on B and then sells it to C, a hundiwalla whose business it is to advance the entire money minus his commission on the hundi. C or his agent in Bombay will then present the hundi to B after the goods arrive in Bombay. B may pay the hundi and take delivery of the goods. If he refuses to pay, C can recover from A the money he advanced. But if the goods are lost totally C cannot recover any money from A. He must bear the whole loss. That is why these hundis are similar to insurance policies. But if the goods are only partially damaged C can recover the money from A.

*Jawabee hundi*.—The transaction known by the name of Jawabee hundi is as follows:—

A person desirous of making a remittance writes to the payee and delivers the letter to a banker who either indorses it on to any of his correspondents near the payee's place of residence or negotiates its transfer. On its arrival, the letter is forwarded to the payee who attends and gives his receipt in the form of an answer to the letter, which is forwarded by the same channel to the drawer of the order. This, it will be noticed, is more in the nature of a letter of recommendation than a bill of exchange. The banker may cancel the order for payment by advice to his correspondent at any time before payment, in case the so-called drawer fails in his promise to provide the banker with the amount of the order.

*Zickri chit*. According to the usage of shroffs in the case of Marwari hundis, a hundi may be accept-



## CHAPTER VII

# BANKS AND BANKING

### Banks and banking

The word *bank* is derived from the Italian "banquo", a bench, from the fact that the earliest bankers in this country, the Lombards, did their money changing on "banks" or benches, with which is connected the word "bankrupt" from the custom—when a merchant was insolvent—of taking his "bank" and breaking it in pieces in the sight of all people.

The law relating to banks and banking may be divided into two distinct branches, namely (a) the law regulating the business of banking; *i.e.* relations between bankers and their customers and between bankers and the outside world, and (b) the law regulating the organic side of bankers as an institution. The former deals with matters like the payment and collection of cheques and other negotiable instruments and the rights and obligations of bankers in respect thereof both in relation to their customers as well as to members of the general public. The latter deals with matters like the incorporation, management and dissolution of banking concerns.

The *main functions* of banking are: (a) The receipt of money on deposit from those with surplus wealth at their disposal; (b) The granting of loans and overdrafts on approved lines, and (c) The indirect granting of accommodation by the purchase of credit instruments. *Supplementary functions* of a modern bank are (i) Receipt of dividends and interest. (ii) collection of coupons and drawn bonds, (iii) safe custody of valuables etc; (iv) Management of securities lodged for safe

custody; (v) purchase and sale of securities, (vi) the issue and service of loans, (vii) acceptance of bills on behalf of creditors; (viii) the issue of personal and commercial letters of credit, (ix) acting as trustees or executors: (x) acting as reference, supplying trade information, statistics; etc

### **Relationship between banker and customer**

There is, as yet, no statutory definition of "customer", but it would seem that any person keeping an account-current or deposit-is entitled to the description. It would appear from the judicial decisions that if a banker renders to a person services incidental to, but not peculiar to, the business of banking, he does not thereby constitute that person a customer. For instance, if a person occasionally goes to a cashier of a bank and gets cheques cashed or deposits valuables or securities for safe custody, or buys a few stamps, he does not thereby become a customer of the bank, as such transactions are not regarded in the nature of the real banking business

The relation of banker and customer is primarily that of debtor and creditor, the respective positions being determined by the existing state of the account. To say that money is "deposited" with a banker is likely to cause misapprehension. What really happens is that the money is not deposited with, but lent to, the banker, and all that the banker engages to do is to discharge the debt by paying over an equal amount when called upon. "Money when paid into a bank, ceases altogether to be the money of the principal, it is then the money of the banker, who is bound to return an equivalent by paying similar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker, it is then the banker's money, he is known to deal with it as his own; he makes what profit he can, which profit he



retains to himself, paying back only the principal.... or the principal and a small interest.....". The banker is thus not an agent or factor but he is a debtor.

The word "customer" signifies a relationship in which duration is not of the essence. Even, therefore, a first transaction with a person is sufficient to constitute that person a customer. A person whose money has been accepted by bank on the understanding that it undertakes to honour cheques up to the amount standing to his credit is, whether his connection with the bank is of short or long standing, a "customer" of the bank.

Express demand is a necessary condition for a cause of action to recover a debt due from a banker.

With regard to *securities* and *valuables* deposited for safe custody, the banker's position is different. The property in them remains with the customer, who can claim them back. When a banker buys or sells securities on behalf of his customer, he performs an agency function. Similarly, when he collects cheques, dividends, bills or promissory notes on his customer's behalf, he acts as his agent.

### **Bankers as borrowers**

As already explained, the relationship between a banker and his customer is ordinarily that of creditor and debtor, the relative position being ascertained from the state of the account of the customer. Hence, two of the chief functions of a banker are the borrowing and lending of money.

Bankers borrow money by issuing bank notes, receiving deposits, drawing bills of exchange, issuing bonds, debentures, and cash certificates. As the note issue function is generally the monopoly of the central bank of a country and as the issue of bonds, debentures and cash certificates is by no means very popular with commercial banks, the main source of supply of their borrowed fund is the receipt of deposits.

*Bank notes*—Before the introduction of the Government Currency notes in 1862, the three Presidency Banks had the right to issue notes, but their notes not being popular, did not circulate to any appreciable extent. For many years, even after the Government of India took over the issue of notes the use of paper money did not become popular, largely owing to the want of public confidence in this form of currency. With the spread of education and expansion of trade, currency notes have begun to play an important part in the currency system of this country. The Reserve Bank of India is now charged with the function of issuing notes. These bank notes are legal tender.

*Bonds and cash certificates*—In certain western countries, Germany, for instance, some banks borrow large sums of money by the issue of bonds and debentures, payable after a certain number of years, but this method is unknown in England and has not been adopted, to any large extent, by banks in the United States of America. In recent years some banks in India have been selling cash certificates payable after three to five years, but this method of borrowing funds has not yet assumed any great importance.

*Bank deposits*—Bank deposits take three different forms—Fixed Deposits, Savings Bank Deposits, and Current Deposits.

### **Fixed deposits**

The term "*fixed deposits*" means deposits repayable after the expiry of a certain period which ordinarily varies from three months to five years. Fixed deposits are also received for shorter periods than three months, but generally for not less than a month. The period of the deposit is usually fixed at the time the deposit is made. The rate of interest on deposit depends not only upon the length of the period and the amount deposited, but also upon the credit of the bank and the state of the money-market.

The legal position of the banker in connection with fixed deposits is one of a debtor who is not bound to repay the amount before its due date. Some banks reserve to themselves the right to repay deposits before their maturity by giving due notice. This condition, along with others, are printed on the back of the deposit receipt and when the customer's attention is drawn to them they will govern the contract between the banker and his customer. In the absence of such a stipulation the banker cannot return a fixed deposit before the due date without the consent of the customer. The banker continues to be a debtor, even though the period fixed for the deposit has expired and the deposit is not withdrawn and although the banker may not allow interest after the deposit has matured for payment. He does not become a trustee for the customer of the funds so lying with him.

In order to oblige their customers, bankers occasionally allow them to withdraw their fixed deposits, before their due dates. In such cases, either the customer foregoes the interest accrued on the deposit, or he borrows the amount required against the security of his fixed deposit at a rate of interest which is generally one or two per cent. higher than the rate allowed on the deposit.

*Deposit receipt*—When depositing his money, the customer receives a deposit receipt which is usually marked "not negotiable". It can, of course, be transferred by way of assignment to a third party, but a deposit receipt, not being a "negotiable instrument", cannot pass to its transferee a better title than that of the transferor, and, therefore, such receipts cannot be treated like cheques. A "deposit receipt" even if it is expressed to be transferable, has never been recognized as a "negotiable instrument", or as giving the transferee the right to sue in his own name. The fixed deposit receipt with the words "not transferable" printed on the top of it, is not a negotiable instrument and cannot be transferred by a mere indorsement in blank,

In the absence of an agreement, valid cheques cannot be drawn against a deposit account at all, if that is the only account of the customer with the bank.

Whether the return of the deposit receipt to the banker is a condition precedent for the repayment of the loan, depends to a great extent upon the terms and conditions of the deposit. If the return of the deposit receipt is made a condition for payment, no cause of action would then arise until its return. In case of loss of the receipt, however, a court would exercise its equitable jurisdiction and would not allow the depositor's failure to produce the receipt to stand in the way of his reclaiming the money. The court would not probably require the depositor to give an indemnity bond, as a "deposit receipt" is not a "negotiable instrument" and its transfer cannot confer any better title on the transferee than of the transferor.

The law of *limitation* does not apply to a "fixed deposit" so long as interest is being paid on it, or so long as the deposit receipt is being renewed. If the deposit receipt has not been renewed, however, the period begins to run from the date, on which the depositor was entitled to be repaid.

The following kinds of deposits are attachable -

- (a) a deposit repayable on demand,
- (b) a deposit repayable on fixed notice, which has been given;
- (c) a deposit repayable at a fixed future date or after the lapse of a specified time.

Banker's deposit receipt is *exempt from stamp duty*, provided the deposit is not expressed to be received from, or by the hands of, any person other than the one to whom the same is to be accounted for. The exemption holds good though a time be fixed for repayment. Nor does provision for the payment of interest affect the question.

*Deposits in joint names*—Deposits are frequently

received by bankers in the joint names of two or more persons and the conditions subject to which such deposits are accepted regulate the manner of their withdrawal. A debtor only obtains a discharge on payment to all the joint creditors.

### **Savings bank deposits.**

The Savings Banks in India are mostly Government organisations attached to the Post Offices. The Government do not maintain any specific cash reserve to meet their deposit liabilities, which constitute therefore an unfunded debt used for capital expenditure.

All post offices that have savings banks are open to receive deposits daily with the exception of Sundays and other Post Office holidays. The hours for the transaction of business are from 10 A.M. to 3 P.M. and on Saturdays from 10 A.M. to 1 P.M., unless otherwise notified.

At these banks any person—man, woman or child—may deposit money, and a guardian may also deposit money on behalf of minors. No account can be opened with a deposit of less than two rupees. No sum less than a rupee, and no sum that includes a fraction of a rupee, can be received. No one is allowed to deposit more than Rs 750 in each official year (1st April to 31st March) after deducting the amounts withdrawn during the year, or to have at any time more than Rs 5,000 at his credit in cash (exclusive of interest), but a depositor can invest, in an official year Rs. 5,000 in Government securities. Government promises to repay the money, with interest, to the person depositing it in his or her own name whether man, woman or child, but in the case of accounts opened on behalf of minors, Government will not repay this money during the minority of the minors to anyone except their guardians. A depositor may withdraw money once a week. He may not withdraw any sum which is less than a Rupee or, unless it be for withdrawing the whole balance at his credit and closing the account, any sum that includes a fraction of

a rupee or would reduce the balance to less than two rupees. When an actual withdrawal has to be made, the depositor must take or send his pass-book to the post-office at which his account stands, with an application in a prescribed form signed by him. If he cannot write, he must attend the Post Office and affix his mark or seal to the form, to be attested by the signature of a witness. Payment will then be made to the depositor, or to the person presenting the signed application and pass-book, and his receipt taken, *in all cases free of stamp duty*, on the order for payment. The payment of a withdrawal at a sub-office is subject to the condition that funds are available in the office. If funds are not available, they will be obtained as soon as possible, and in such cases the depositor will be told on what day to come for the money, and on that day payment will be made. At a branch office payment cannot be made until an order of payment is received from the head office or sub-office to which branch office is subordinate.

*Commercial banks* — The commercial banks have also found that it is a paying business to take in such deposits, however small they might be. The advantages of such deposits to a bank are that a very small reserve is sufficient to meet demands on them, as, generally, a depositor is not allowed to withdraw more than a fixed amount, Rs. 500 to 1,000 in any one week. Larger sums may be withdrawn after giving two or four weeks notice. Moreover, some banks do not permit such accounts to be operated upon by means of cheques, so that the banker does not run any risk in connection with paying out cheques. Interest is generally allowed on minimum monthly balances and not on daily balances. Some banks, including the post office savings banks, allow interest on deposits received up to the fourth of a month, so as to enable those receiving small salaries to deposit their money and earn interest thereon.

### Current deposits

By taking current deposits, the banker undertakes to honour his customer's cheques as long as his account is in credit. This obligation has already been noticed in the preceding chapter. The customer has to pay for the stamps on the cheques if they are liable to stamp duty, but the cheque-forms as well as the pass book are supplied free of charge by the banker.

*Interest*—Except in large cities most banks do not allow any interest on current deposits. In cases where interest is allowed, amounts exceeding rupees one lakh are generally subject to a special arrangement. Sometimes, customers are required to maintain a minimum balance, failing which they have to pay bank charges either in the form of commission on the half-yearly turnover of the account or a certain sum of money every half year.

### Opening an Account.

Before opening a new account, a bank should take the following precautions:

(a) A banker should not open an account with a person unknown to him without first obtaining references from responsible parties as to the proposed customer's integrity and responsibility. Omission to do this may have unpleasent consequences, not only for the banker concerned, but for other bankers and the general public also. As a result of the failure to make the necessary inquiry, the banker might enable a dishonest person to obtain for fraudulent purposes, the possession of a cheque book and if such a person happens to be an undisclosed bankrupt, the banker might be placed in a difficult position by unwittingly allowing such a person to operate on his account with the bank.

(b) Every customer is expected to have read the rules of business of the bank and to confirm in writing his willingness to comply with and be bound

by them before his account is opened. He is required to supply his banker with one or more specimens of his signature and these are usually entered in a signature book maintained for the purpose by the bank. However, the modern practice is to have the specimen signatures on cards, which are indexed and filed in an alphabetical order. Each customer's full name should be written in bold characters above his account in the ledger, his address and occupation should also be added. Where the customer does not use his full name, or all his initials, the account should still be headed with the full name, and a note made of the manner in which the customer signs. Where the customer is a limited company, the names of the directors and secretary should be given, and, in the case of a fund, society or committee, the names of the persons who are responsible for the account. Full names and addresses of all persons who are joint account holders or partners should be recorded in the ledger. Particulars of all authorities to sign on our account and also of any credits opened with other branches and banks for the encashment of the customer's cheques, should be entered in the ledger against the heading. If the customer is allowed to overdraw, the amount of the sanctioned limit and its expiry date should be duly recorded. The object of recording these facts is to provide the ledger keeper with the information he is most likely to require when posting the ledger.

(c) In case a customer desires that his account be operated upon by another person, a *mandate* in writing to that effect, as well as the specimen signature of the person in whose favour the mandate is given, should be obtained by the banker. Power to draw and indorse cheques does not include power to accept bills or overdraw the account, it is, therefore, necessary that the customer's instructions to his banker should specifically state so, if he wishes the banker to allow the person to overdraw the account. The banker should have notes of such instructions of his customers en-



tered on the ledger accounts of those customers

(d) With a view to facilitate the receipt of credit items paid in by a customer, bankers provide the customers with paying-in-slip books. The right hand portion is retained by the bank and the counterfoil is returned to the customer only initialled by an officer of the bank.

(e) In the absence of a notice, explicit or implied the banker is not concerned with the question of the customer's title to money paid in by him. Money may be paid into a customer's current account by a third person, which the banker is ordinarily bound to accept.

### Special types of customers

*Minor's account*—A current account may be opened in the name of a minor and the banker runs no risk in dealing with him, as long as his account is in credit. In view, however, of the fact that a contract with a minor is void, it is advisable to open the account in the name of his guardian. This will enable the banker to recover the amount of the overdraft which he may have granted even by mistake.

*Lunatics*—No banker would knowingly open an account in the name of a person of unsound mind because that would easily involve him "in the difficulty of choosing between the risk of unjustifiably dishonouring the customer's cheques, on the one hand and of being held to have debited his account without adequate authority on the other". However, a banker who discounts a bill duly drawn, accepted, or indorsed by a lunatic, can realize the money due thereon from him, unless it can be proved that the banker knew of the fact of the lunacy of the party at the time of discounting. But when a banker comes to know of his customer's lunacy, all operations on his account should be suspended until the receipt of an order from the Court, or the definite proof of the customer's sanity.

*Drunkards*—If a customer tenders when drunk,

a cheque for which he demands payment, the banker would be advised to have a witness to the signature and the payment of the amount

*Married women*— A current account may be opened in the name of a married woman. She has power to draw cheques and give a sufficient discharge and *bona fide* dealing with the account cannot subsequently be questioned to the prejudice of the banker. In the case of an overdraft the banker will have no remedy against her if she has no separate estate, and even if she has separate property such as *stridhan*, the property may be settled upon her in such a way that she can only use the income as it falls due and can neither touch the corpus nor the anticipated income.

A married woman cannot make her husband responsible for debts incurred by her, except in cases where she acts as his agent, or where she borrows for her necessities or for the household. The husband, however, can escape liability, if he can prove that his wife was already well supplied with the necessities of life or that he had forbidden her to borrow in his name. Again, the banker should also keep in mind the fact that, in the case of an overdraft, he will have no personal remedy against a married woman, as she cannot be committed to prison for non-payment of a judgment debt. Looking to the difficulties with which making of contracts with a married woman is beset, a banker will be well advised not to entertain any married woman's application for an overdraft, without very careful precautions to safeguard against loss.

*Trading companies and corporations*—Where a company opens an account, the bank should ascertain as to who is authorised to draw cheques on the account under the Articles and Memorandum of the Company. Usually at the time of opening the account the bank satisfies itself as to the persons entitled to draw on the account and obtain their specimen signatures. The bank is only obliged to look into the arti-

cles and memorandum of the Company in order to find out the scope and authority of the persons dealing with the Company's account. It is not bound to enquire into the regularity of the proceedings. If a director has the authority under articles and memorandum of the company to draw cheques on the company's account, the bank will not be liable to the company if it turns out that the cheque was in fact issued for a purpose other than that of the company or that the board of directors had by a resolution limited his authority to draw cheques unless the bank has notice, express or implied, of the same. But the bank must scrupulously comply with the directions given at the time of the opening of the account. Thus if the cheques on a company's account are to be drawn by at least two directors, according to the directions given, and the bank negligently and contrary to directions pays cheques signed by one of them only or signed by a new director who has no authority to draw and as to whose authority the bank makes no enquiry, the bank would be liable to the company for the amount of the cheque unless the same is paid to the creditors of the company. In such a case the bank would pay the cheques at its own risk and should the cheques be drawn in favour of persons who are not the creditors of the company, the bank would be liable for the amount of the cheques.

*Trust Account.*—A trust account is constituted where a trustee or trustees open an account expressly as trustees and also where the trustee opens an account in his personal name but the bank is fixed with notice of the trust either by the very nature of the account or by express notice thereof. A trustee cannot use the trust money for his own benefit for any purpose other than that of the trust. Hence if an account is opened by a trustee as a trustee, the bank has express notice that the funds are trust funds, and it should refuse to honour cheques by the trustee in his own favour or for any purpose alien to the trust if that is obvious;

otherwise it will be liable for conversion to the beneficiaries. But difficulties arise where the trustee opens the account not as a trustee expressly. In such a case a trust is implied if the trust is obvious from the nature of the account *e.g.*, where the account is headed "Police Account", or "School Account". But an account headed "Office Account" has been held not to imply any trust, for a man may divide his account into personal and office accounts. If the money belonging to a trust account is drawn out and paid into the private account of the trustee the bank is liable to make good the money so drawn out. A bank may also be held liable for wrongfully paying out trust moneys if it receives independent intimation regarding the trust where the trust is not obvious or the account is not an express trust account, and a bank cannot obtain protection by wilfully refraining from obtaining information as to the true character of the account. But the bank is under no duty to scrutinise the purpose of every cheque drawn by a trustee and if it is otherwise regular it is bound to honour such cheque and it is not to be held liable for such payment. The bank is entitled to presume that the act of a trustee in drawing cheques for third parties is in the course of the lawful performance of his duty and honour such cheques accordingly.

Where there are more than one trustees, all the trustees must jointly sign a cheque drawn on the trust account unless the terms of the trust provide otherwise, and on the death of one of several trustees the bank must not honour cheques on the trust account drawn by the survivor or survivors unless otherwise provided by the terms of the trust.

*Partnership Account*—All cheques on the partnership account must be drawn in the name of the firm and in the absence of instructions to the contrary every partner has the right to draw on the partnership account in the name of the firm. The very fact, that an account has been opened in the firm's name is

evidence of authority of each partner to draw. In the case of death of one or more partners the surviving partner or partners may draw on the firm account. But the modern practice is that on the death of a partner, the partnership account should be operated on only for the purpose of winding up the partnership and the bank should insist on opening a new account with the balance, if any, remaining of the old account.

*Executor's and Administrator's Account*—Where an account is opened by the executor or administrator of a deceased person in respect of funds belonging to the estate of the deceased, such an account is called the executor's account or the administrator's account as the case may be. A bank must not honour cheques drawn by an executor or administrator for his own benefit or for purposes other than that of paying the debts and legacies of the deceased provided the bank has express or implied notice of the same. In this respect the liability of the bank is similar to that in relation to trust account. Where there are more than one executor or administrator, each can separately operate and draw cheques on the account unless they are forbidden to do so by the will of the deceased or the letters of administrations. Hence on the death of one of several executors or administrators, the bank may pay cheques drawn by the survivor or survivors and such a payment will exonerate the bank.

*Agent's Account*—Where an agent operates an account on behalf of his principal to the knowledge of the bank, the bank must see that the agent acts within the scope of his authority and does not misuse his position. Thus where the customer of a bank who was the agent of a company and was, according to the terms of the agency, bound to use the proceeds of drafts drawn on the principal for the purpose of paying for the purchase made by him on his principal's behalf, discounted some of those drafts with the bank

and paid the proceeds into his own account it was held that the bank was liable for conversion and was bound to pay the proceeds of these drafts to the principal company. So also where a person authorised under a power of attorney to draw cheques on the customer's account, drew and paid them into his own private account, the bank which paid and collected the cheques was held guilty of negligence and liable to pay the amount of the cheques to the customer since they had notice that the agent was using the principal's money for his own purpose. Similarly, where an agent authorised to operate on the principal's account for seeking more profitable investment used the funds to adjust his own debts to the bank, it was held that the bank was not entitled to debit the principal's account by such adjustment.

*Joint Account*—When an account is opened in the name of two or more persons jointly, it is called a joint account. In the absence of any agreement cheques drawn on an ordinary joint account should be signed by all the parties in whose name the account stands. But by agreement the parties may stipulate that any one of them may draw on the joint account without the concurrence or signature of the other. In case of death of any one of the parties, the bank is justified in allowing the survivor to draw any balance standing to the joint account, even as between husband and wife, whether both or either one is entitled to draw.

*Clubs, Schools etc.*—Accounts are often opened, in the names of non-trading institutions such as clubs, schools, committees, funds, associations, etc. It should be remembered that such bodies, if not incorporated, have no contracting powers or they have no legal personality. They can neither be sued nor are the individual members of such institution liable for any overdraft, so long as the members signing the cheques do so in their respective capacity and not in their individual capacity.

However, if the account is opened in the form "R.N Gupta, account Hindu Club," then Mr. Gupta can be held personally liable for the overdraft created by the drawing of cheques on this account. The banker having satisfied himself that the club committee etc., wishing to open an account is a properly incorporated body, should ask for a duly authenticated copy of the resolution of the managing committee authorizing the opening of the account giving the necessary powers to a certain person or persons to operate upon the same. If the person authorized to operate upon the account of the club or association happens to have his personal account with the same bank, it must see that no club money should find its way into the personal account of the office bearer of the club.

*Bankrupts*—When a customer gives notice to his creditors that he has suspended or is about to suspend payment of his debts, or when he has filed in the court a declaration to the effect that he is unable to pay his debts, a banker should stop all business transactions with him. The whole of the debtor's property will be vested in the Official Receiver or in Presidency towns, in the Official Assignee who will administer it for the benefit of the creditors generally, the object being to protect the property from the debtor and also from any individual creditors who may seek to obtain preferential treatment. Special care should be taken in the case of undischarged bankrupts, who are subject to a number of disqualifications.

*Liquidators*—Bankers should also be careful while dealing with persons appointed to wind up the affairs of a company. A liquidator's business is to realize the company's assets and to collect any amounts owing by the share holders. He has to apply the funds thus collected in payment of the company's debts and distribute the balance, if any, among its shareholders. He has the powers to borrow money against the security of the company's assets and to draw, accept, make and indorse bills and notes, in the name

and on behalf of the company. In the exercise of any such powers, he is free from any personal liability.

*Local Authorities*—When a banker is asked to open an account in the name of a local authority, he should satisfy himself as to the authorized method of dealing with its funds, the persons by whom cheques are to be drawn and all other relative questions. The answers to these questions will generally be found in the special Acts constituting such bodies and it is therefore necessary to refer to the relative Act when a request to open an account from such a body is received. It must, however, be remembered that in allowing overdrafts to such bodies, a banker runs a great risk, as their borrowing powers are circumscribed and obscure.

### **Employment of funds.**

The profitable uses which bankers in India make of their funds, may be classified as follows:

(1) Call loans, and loans repayable at short notice, (2) Purchase of stock exchange securities, (3) Loans and advances, and (4) Discounts.

(1) *Call loans and loans repayable at short notice*—The call loans and loans repayable at short notice, represent largely the amount lent to the money-market, the bill brokers and discount houses, and to a smaller extent to the members of the Stock Exchange "from account to account." In the leading money-markets of the world, the call money rates, namely, the rates for surplus money seeking employment for possibly a minimum period of twenty-four hours, are considerably lower than the bank rate. In India, owing to lack of a well-organized money market, call money is sometimes almost unobtainable in the slack season, at any rate when treasury bills are not available. Consequently, in India the item of call loans and loans payable at short notice did not assume any great importance, although more business in such loans was done during



the period following the first great war than that preceding it.

*Purchase of stock exchange securities*—Bankers invest a fair percentage of their funds in first class exchange securities. The more important of these securities are (i) public debts, for instance, when Government raises funds for irrigation, railways and other development schemes. (ii) semi-Government securities, such as port trust, improvement trust and municipal bonds and debentures; (iii) railway securities, which include shares, stocks, bonds and debentures of different kinds of railways, (iv) securities of the public utility companies, that is, companies engaged in the distribution of water, light, heat and that supplying the means of transportation and communications, and (v) industrial securities, which include all the securities, such as shares, stocks, bonds and debentures of companies, engaged in the production or distribution of the large variety commodities, and services used in modern life.

A banker must not invest haphazardly. Among principal qualities that go up to make an ideal investment, the safety of the capital and the stability of the income are regarded as the most important ones. Among the other factors which count are easy marketability, reasonable freedom from burdensome taxes, exemption from care, stability of price, acceptable denomination and chances of capital appreciation. A banker must first look to the safety of his funds, as he cannot afford to lose the money he thus invests. He also must make sure that the securities in which he invests his funds are easily saleable without appreciable loss. The investments which are popular with bankers, possess the attribute of stability too. A banker must also consider that his investments should bring him a fair and stable return on the capital outlay, although he should not look for the high yield which comparatively speculative securities are able to give. Therefore in

calculating the net yield, it is necessary to take into account the market price, the rate of interest the securities carry, and the loss or gain, if any, at the time of redemption.

*Loans and Advances*— In normal times the percentage of funds invested by most of the banks in stock exchange securities is not very large, and therefore, they have to look to other profitable avenues besides those already mentioned, for the employment of their funds. Amongst these, are the granting of loans and overdrafts and discounting of commercial bills. There is no fundamental difference between the different forms in which bankers give accommodation to their customers.

The loans may be given with or without security. Where loans are given on the security of mortgages in immoveable property, the ordinary law of mortgage will prevail. Where loans are given on securities or negotiable instruments or other kinds of moveable property, the position of the bank is that of a pledgee. It has the right to sell the goods pledged with it if the borrower fails to pay within the time fixed, or where no time limit is fixed, after the expiry of the time within which he is required to repay by notice given by the bank fixing a reasonable time within which he is required to pay.

"Safety first" should be the first guiding principle of banker, so far as his advances are concerned, because the very existence of a bank depends on the safety of its outstandings, which should never, therefore, be sacrificed to the profit earning capacity of its advances. Secondly, the banker while making advances must see that the money he is lending is not going to be locked up for a long time which would make his loans and advances less liquid and more difficult to realise in case of emergency. In fact, it is not the function of the commercial banks to make loans which are more or less of a permanent nature. It is also necessary

remember that a prudent banker must avoid investing all his funds in meeting the needs of any one industry or any group of industries for considerations of self-interest as well as the larger public good. Another important factor that will determine the decision of the banker whether or not to grant a loan, will depend upon the answer to the question whether or not he will get a fair return on his investment. The difference between his borrowing and lending rates constitutes his gross profit and no banker ordinarily will think of an advance without a satisfactory margin of profit.

### **Advances by banks.**

An Indian banker's advances are generally either clean advances against personal credit with a second signature to the promote, or against tangible or marketable securities, lodged or pledged with the lender. The third class of loans, namely, clean advances against personal credit of the borrower only, which are fairly common in western countries, is not favoured by bankers in India, who rather prefer promissory notes endorsed by shroffs, or managing agents of some companies.

*Cash Credits:* Advances by Indian Banks, generally takes the following three forms, *i.e.*, *cash credits*, *over-drafts* and *loans*. A cash credit is an arrangement by which the banker allows his customer to borrow money upto a certain limit against either a bond of credit by one or more securities, or certain other securities. This is the most favourite mode of borrowing by large commercial and industrial concerns in India, on account of the advantage that a customer need not borrow at once the whole of the amount he is likely to require but he can draw such amounts as and when required.

*Over-drafts.* When a customer requires temporary accommodation, he may be allowed to overdraw on his current account, usually against collateral securities. From the customer's point of view this

arrangement, like the cash credit, is advantageous as he is required to pay interest on the amount actually used by him. The essential difference between cash credit and over-drafts, is, that the latter is supposed to be in the form of bank credit to be made use of occasionally whereas the former is used for long terms by commercial and industrial concerns doing regular business

*Loans*—When a banker makes an advance in lump sum which cannot be paid wholly or partially with permission to its subsequent withdrawal it is called a loan. If the customer repays the sum either wholly or partially and wishes to have subsequent accommodation, the latter will be treated as a separate transaction to be entered into, if the bank agrees to do so and subject to such terms as the bank may like to impose

The Indian Company Law requires that the advances made by a registered company including the bank should be classified as secured and unsecured and shown separately in its balance sheet. An *unsecured loan* is one for which the banker has to rely upon the personal security of the borrower. The chief basis of such transaction is the personal credit of the customer. This will be a matter of enquiry for the banker before advancing the loan.

### **Loans without collateral securities**

In modern times it is only in very few cases that a banker would agree to loan money against personal security of the borrower. When a borrower is unable to give suitable collateral securities for securing advances applied for by him, he is asked to get the guarantee of some other person, about whose credit the banker is satisfied.

The most important form in which bankers give accommodation without any collateral security, is the *discounting of clean bills*. Bills discounted by

banks belong to one of the following categories: (a) clean bills, (b) documentary bills and (c) bills drawn under credit.

Certain precautions are necessary in discounting the bills. In the first place, the banker should see that the bills he discounts, are genuine commercial bills and not in the nature of accommodation paper, as the former have the advantage of being backed up by goods, while the latter is without any real backing. For example, when a cloth merchant in Delhi buys a few bales of *dhoties* from a Bombay merchant, and, being unable to pay cash for this purchase accepts a bill drawn upon him by the Bombay merchant, he hopes to sell the goods and meet his acceptance with their proceeds. Thus, the bill is backed up by actual goods—*dhoties*. On the other hand, if the bill discounted is "kite" or accommodation paper, which is merely a means between the drawer and the acceptor of raising money, it will not have such goods as a backing. The proceeds of such a bill may be utilised, not in the actual purchase of fresh goods, but either in the payment of certain expenses or antecedent debts. Although, it may appear to be difficult to differentiate between the bills of one class from that of the other, the banker, generally, does not experience much difficulty in differentiating between the genuine bills and the accommodation paper. The question which the banker has to put to himself, is, whether or not, the bill is likely to have been issued as the result of some actual commercial transaction between the drawer and the acceptor. It should also be remembered that Bills given in payment of fixed assets such as buildings or machinery, should be avoided, as such bills cannot be regarded as liquid. *Secondly*, the question whether the banker should buy commercial paper bearing certain names depends not only upon credit of the parties, but also upon the class to which the bills belong for acceptance. The banker need not make thorough inquiries about the credit of the parties in

case of documentary bills to which documents of title to goods, such as bills of lading, railway receipts, insurance policies, or invoices, are attached, particularly when the goods concerned are necessities of life. In case of dishonour of such bills by the drawee, or in the event of any difficulty arising in connection with the realisation of the amount from the drawer, the goods can be sold and the chances of loss to the banker minimised. However, it must be remembered that such bills should not be purchased from parties whom the banker does not know well, as there are certain risks attached to the business. *Thirdly*, the banker has to satisfy himself regarding the credit of the drawer, acceptor and other indorsers. The banker should also see that the bill is complete in every respect and that it is duly stamped.

*Guarantees as security for banker's advances—*

When banker's advances are not secured by means of collateral securities and the personal security of the borrower is inadequate, guarantees play an important part. The need for this form of security arises not only when an applicant for loan cannot offer any tangible security, but also when the banker finds that his customer's position is weakened or the depreciation in the value of the collateral security has resulted in leaving the banker's advances inadequately secured. *Contracts of guarantee* have already been dealt with in an earlier chapter and may be referred to.

No banker will ordinarily accept the guarantee of a person of whose credit he knows next to nothing. If a guarantee is to be of any real value, the banker should make the necessary inquiries about the character and financial position of the proposed guarantor as, if the guarantor's financial status is unsatisfactory, the contract of guarantee is of no value.

Usually, bankers require the guarantors to execute the guarantee in the bank manager's presence. It is not admissible to allow the customer to take the

guarantee form away and himself obtain the signature of the guarantor thereto. This is, firstly, because the guarantor's signature may turn out to be a forgery, or he may later on allege that he signed in ignorance of the nature of the document, and secondly, the guarantor when called upon to discharge his obligation, may putforth the plea that he signed under a misrepresentation made by the man to whom the bank entrusted the document to obtain the guarantor's signature

In the case of loans secured by guarantees, the guarantor usually does not pledge any tangible security, but merely promises to pay the amount due from the principal debtor, if the latter fails to do so

### **Advances secured by collateral securities.**

Bankers come across different types of securities according to the locality in which they carry on their business. In large cities like Bombay, Calcutta and Madras which have much rich and upper middle class people the banker is called upon to make advances against gilt-edged and other stock-exchange securities. In large industrial and manufacturing places the mills and factories require accommodation against stocks of raw materials and finished goods. In the agricultural centres it is the agricultural produce which occupies the principal place among securities offered to bankers.

Bankers usually secure their advances by stock exchange securities, bullion, goods, documents of title to goods and immovable property. Sometimes, miscellaneous securities, as for example, life policies, ships, and accounts receivable are accepted as securities for banker's advances. When loans are given on the security or mortgages in immoveable property the ordinary law of mortgage will prevail. Where loans are given on securities or negotiable instruments or other kinds of moveable property the position of the bank is like that of a *pledgee*. It has the right to sell the goods pledged with it if the borrower fails to pay within the time fixed or, where no time is fixed, after the expiry of

the time within which he is required to repay by a notice given by the bank fixing a reasonable time within which he is required to pay.

Where a loan given by a bank is secured by documents of title *e.g.*, a railway receipt or a bill of lading, the bank acquires the rights of a pledgee in respect of the goods to which the documents refer and does not lose such rights by parting with the custody of the documents or by entrusting them to the borrower or his agent for the special purpose of dealing conveniently with the goods *e.g.* for collecting them from the Port Trust and putting them into the bank's godown. If the borrower commits a fraud by obtaining further advances from other persons on the security of the same documents while they are given to him by the bank for such special purpose, the bank's title to the goods will not be affected by the interests of these other persons so defrauded even though such fraud would not have been committed but for the bank parting with the custody of the documents. But the bank will not be protected where it parts with the custody of the documents or carelessly leaves them with the borrower for no such special purpose and an innocent third party is defrauded thereby.

If the borrower has no title or a defective title to any security or document of title, or moveable property on the security of which a bank advances a loan, the true owner can recover such security or document or moveable property from the bank or hold it liable for damages for conversion in case it has disposed of or dealt with the same except in the following cases. —

(a) Where the borrower as a mercantile agent of the owner has obtained possession of the security, goods or document with the consent of the true owner and pledges the same to the bank which accepts them in good faith and without notice of the want of authority of the borrower

(b) Where the borrower having sold the goods



or security continues to be in possession of the goods or security or the documents relating to the goods and pledges the same himself or through a mercantile agent to the bank which receives the same in good faith and without notice of the previous sale

(c) Where the borrower, having bought or agreed to buy the goods or security, obtains possession of the goods or documents relating thereto or the security before paying the price thereof and pledges the same himself or through his mercantile agent to the bank which receives them in good faith and without notice of the seller's lien for the unpaid price.

(d) Where the borrower obtains possession of the goods or security under a voidable contract *e.g.* one tainted by fraud or duress and pledges the same before the contract has been rescinded by the true owner and the bank receives the same in good faith and without notice of the defect in the borrower's title.

(e) Where the true owner is estopped by his conduct from disputing the title of the bank

Where the bank accepts a negotiable instrument payable to bearer as security for a loan, the bank becomes a holder in due course to the extent of its lien and can realise its dues by sale or negotiation of the instrument and retain the same as against the true owner whether the borrower had any title in the instrument or not. Where, however, the bank accepts a negotiable instrument, payable to order as security for a loan the bank will become a holder in due course, if the bill is indorsed in its favour, to the extent of its lien unless the indorsement of the borrower or some other previous indorsement is forged. Where the indorsement is forged the bank will be liable to the true owner unless the bill came into the possession of the borrower under any one of the circumstances mentioned above so as to estop the true owner from disputing the title of the bank.

### Payment of drafts

Banker's draft is an order addressed by one bank to another or by one office of a bank to another office of the same bank to pay a specified sum to the payee named or his order. But a branch office of a bank cannot issue a draft payable to bearer on demand on the Head office or another branch of the same bank and *vice versa*. Hence drafts between two branches or a branch and head office of the same bank must be issued payable to the payee or order. Where any such draft drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand, purports to be endorsed by or on behalf of the payee, the bank is discharged by payment in due course. The bank will not be liable if it pays on a forged indorsement so long as the indorsement is regular and there is nothing to suggest any suspicion. Such drafts cannot be regarded as cheques since the drawer and the drawee are in law the same. Hence they cannot be crossed. But the protection against liability for payment on forged endorsements as indicated above makes hardly any difference for the bank as to whether they are crossed or not. Even if such a draft bears any crossing the bank must pay it across the counter on presentment provided it is duly endorsed. If the bank refuses to pay the holder, the holder can sue the bank either as a drawer of bill or a maker of promissory note.

Drafts drawn by one bank on another are to be regarded as cheques and the law relating to their payment by the drawee bank is the same as in the case of cheques. Such cheques may be crossed and if so they can be paid only when presented by a bank.

### Payment of bills of exchange accepted payable at a banker's

Where a customer accepts a bill payable at his banker's it constitutes an authority to the banker to pay it at maturity and if no funds are available, amounts

to a request for an overdraft, and the banker is under no obligation to pay the bill, even though he has sufficient funds in hand. The bank can charge the amount of the bill on the customer if the bill is payable to bearer and the bank pays the bearer in due course. A bill of exchange is payable to bearer if it is constituted to be so or endorsed in blank or if the payee is fictitious. But if the acceptance of the customer is forged the bank cannot charge the customer with the amount of the bill on the same principle as that by which a customer cannot be charged with the amount of cheque to which customer's signature has been forged unless the customer is precluded from denying his signature by estoppel or adoption. A bank is also not entitled to charge the amount of the bill on the customer if the bill is payable to order and payment has been obtained on forged endorsement of the payee's name if the payment has been made in due course. The law protects a bank only when it pays the bearer the bill in due course and in the case of no other bills. Hence it is safe for a bank to insist on bills payable to order being presented through the bank for payment.

### Collection of cheques.

One of the principal duties of a bank is to collect cheques drawn on other banks and paid in by its customers for collection. While discharging this function it is known as the collecting bank as distinguished from a drawee bank on which the cheques are drawn. As such agent's duty is to present any cheque paid in by its customer, for payment with reasonable diligence i. e. *within a reasonable time*. It has been held that the reasonable time in presenting the cheques would be within one day after the receipt thereof where the cheque is drawn on a bank in the same place or forwarding or presenting it on the day following the receipt thereof, where the cheque is drawn on a bank in an other place. After the expiry of a reasonable time the customer paying in the cheque for collection is en-

titled to presume that the cheque has been collected and the proceeds therefor have been credited to his account. The customer can, therefore, draw a cheque for an amount not exceeding the amount to be collected after the expiry of such reasonable time. If the bank has failed to collect the cheque in the meantime, it cannot dishonour the cheque on the ground of shortage of funds, for there would not have been any shortage had it fulfilled its duty in collecting the cheque promptly. If it dishonours the cheques on this ground the customer can recover damages for wrongful dishonour. If the bank makes delay in presenting the cheque, the bank will also be liable to the customer for any other loss which the customer may sustain by reason of such delay. It should be noted, however, that where the collecting bank forwards the cheque drawn on a bank in another place for collection, it may be forwarded at either to its own branch or to an agent in that place. In that case the branch or the agent has one day after the receipt of the cheque in which to present the cheque and the reasonable time will not expire after one day after the receipt of the cheque by the collecting bank, but after one day after the receipt thereof by such branch or agent. But the collecting bank will be liable in case of delay in presentment by such branch or agent. Presentment need not be actual presentment on the drawee's bank but presentment by a recognised clearing house or by post is sufficient. A non-clearing bank may present through a clearing bank.

When a cheque paid to a collecting bank is *dishonoured* on presentment, the collecting bank must give due notice of dishonour to the customer. The bank usually conveys the notice of dishonour by returning the cheque to the customer which is deemed a sufficient notice of dishonour, if the customer has endorsed it. The bank can also debit the customer with the amount of the cheque if it credited his account with the amount prior to collection.

As already stated, a customer can draw cheques on the amount of cheques paid in for collection only after the expiry of a reasonable time necessary for the bank to collect cheques and complete the necessary book keeping entries. What will be the reasonable time after which the customer will be entitled to draw against a cheque paid in for collection is to be decided by the facts and circumstances of each case. For instance, more time will be necessary for a Delhi bank to collect the proceeds of a cheque drawn on a Bombay bank and to make them available for the customer than will be the case when the paying or drawee bank is a Delhi bank. Where, however, a customer is credited with the amount of a cheque paid in for collection prior to the receipt of payment in respect thereof, the customer is at once entitled to draw on it, although the bank is entitled to debit the amount if the cheque is subsequently dishonoured on presentment.

*Liability of a collecting bank to third parties—*

A collecting bank incurs liability to a third party who is the true owner of the cheque in case the customer on whose behalf it collects the cheque happens to have no title or defective title therein. The true owner has only to prove that the customer on whose behalf the collecting bank was acting was not the true owner and had no reason to receive payment in respect of the cheque. Such a situation arises where the customer obtained the cheque from the drawer or holder by means of fraud or offence or where he obtained some by endorsement or delivery from a person who so obtained it unless he is the holder in due course or the person from whom he obtained it was himself the holder in due course. But even the holder in due course acquires no title where he obtains the cheque by virtue of a forged indorsement by the thief or forger. Thus in all cases except theft or forgery a *bonafide* holder for value without notice will acquire a valid title as against the true owner. In case of theft the holder in due course will not acquire the valid title

unless the cheque has been perfected so as to be transferable by mere delivery, *e.g.* when a cheque is payable to bearer or endorsed in blank. But in the case of forged endorsement or forged cheque, the cheque is never perfected. Forgery cannot confer title even to holder in due course. In collecting uncrossed cheques the Bank is liable to the true owner for the value of the cheque if the customer has no title or a defective title thereto. The liability arises in conversion which means a civil wrong or tort consisting of depriving a true owner of his property. But in the case of crossed cheques a collecting bank enjoys certain amount of protection, for the law lays down, as already indicated, that a banker who in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment. A banker is to be deemed to receive payment of crossed cheque even if he credits the customer's account with the amount of the cheque before receiving payment thereof. It is clear that this protection is only limited and a collecting bank will be protected only if it brings itself within the following conditions, viz (1) that it should act in good faith and without negligence in collecting the cheque, (2) that it should receive payment for a customer as a mere agent and not of its own right as a holder, (3) that the person for whom it acts must be its customer, and (4) that the cheque should be crossed generally or specially to the bank.

*Bank's liability as a 'holder in due course'*—As has already been stated, except in the case of forged indorsements and theft of a cheque not perfected (*i.e.* a cheque which has to be indorsed for negotiation) a holder in due course acquires a valid title. Hence where there is no question of forged indorsement a collecting bank may escape liability if it can establish an independent title to the disputed cheque as a holder

in due course excepting where the cheque is crossed "not negotiable". Thus a bank collecting a bearer cheque can escape liability if it is a holder in due course but a cheque crossed "not negotiable" cannot be obtained by a bank as a holder in due course since such a cheque cannot be negotiable and the bank cannot escape liability on that ground. The bank will be regarded as a holder in due course in the following cases. (a) where the bank pays cash for the cheque over the counter, (b) where the cheque is paid in expressly in reduction of an overdraft, (c) where the cheque is paid in on express condition of being at once drawn against, and is so drawn against, (d) where the cheque is paid in subject to a lien in favour of the bank, (e) where an uncrossed cheque is paid in and credited as cash at once. If a bank becomes a holder in due course of any cheque paid in for collection as in any of the above-mentioned cases, it has all the rights of such holder and can sue the parties to it, namely, the drawer and all the subsequent indorsees in its own name in case the cheque is dishonoured on presentment.

### **Collection of bills of exchange.**

A bank is not under any duty to collect bills of exchange for its customers. But if it undertakes to collect a bill for customer, it must present the bill for acceptance and payment in accordance with the law already stated and to give notice of dishonour to the customer in case the bill is dishonoured. This is necessary in order to enable the customer to give notice of dishonour within a reasonable time to the parties he wants to make liable thereon. As the holder of a bill must give notice of dishonour of the parties he wants to make liable within a reasonable time and in default may not be able to hold such parties liable, the bank will be liable to the customer for any loss he may incur as a result of the bank failing to present the bill and to communicate notice of dishonour in due time.

A bank which collects a bill for its customer, to

which the customer has no title, is liable to the true owner for conversion. It does not enjoy the protection which is available to it in the collection of crossed cheques. But where the bank becomes a holder in due course of bills given to it for collection, it will not be liable to the true owner excepting in the case of forged indorsements. A bank will become a holder in due course of a bill payable to bearer by the mere delivery thereof provided (a) the bank pays cash across the counter, or (b) the bill is given expressly in reduction of an overdraft, or (c) the bill is given on express condition of its being drawn against at once or (d) the bill is paid in subject to the bank's lien or (e) the bill is discounted. In the case of a bill payable to order the bank will be a holder in due course if it is indorsed to the bank and paid in under any one of the conditions mentioned above.

### **Collection of banker's drafts.**

Drafts drawn by one office of a bank on another office of the same bank are not cheques since the drawer and the drawee are, in the eyes of law, the same person. They cannot, therefore, be crossed and even if they are crossed, the bank collecting them for customer would not enjoy the protection which would be available to it, if they were crossed cheques. Hence a collecting bank receiving payment in respect of such drafts for its customer who has no title to them, would be liable to the true owner for conversion. But a draft drawn up by one bank on another is a cheque and may be crossed and dealt with as such. Therefore, a collecting bank receiving payment in respect of a crossed draft drawn by one bank on another would enjoy the same protection as against the true owner as would be available to it in the matter of collecting crossed cheques.

### **Letters of Credit and Documentary Bills**

A letter of credit is a document addressed to a specified person or generally by a bank requesting the



addressee, where he is specified, or any person to whom it may be presented, where the addressee is not specified, requesting him to make payments or advances or extend credit (such as allowing the facility to draw cheques) to the person to whom the letter is granted upto a specified amount or intimating him that the grantee of the letter is authorised to draw bills of exchange on the bank upto a specified amount. Where the addressee is specified the letter is '*Special*' and where the letter is addressed to any one to whom it may be presented it is, '*general*' or '*open*'. The letter is generally addressed to an agent of the bank or to a bank at another place. Letters of credit play a very important role in financing international trade and commerce and obviates the necessity for a customer, carrying on trade between different countries or places, to keep his funds tied up in different places.

Where the letter is a request to pay money or extend credit to the grantee, the bank becomes liable to the party so paying or extending credit on the production of the letter. If the letter is special only, the addressee can act on the letter and no one except the addressee can make the bank liable by acting on it. But if the letter is general, no one acting on it may make the bank liable.

Where the letter simply contains an authority to the grantee to draw bills of exchange on the bank upto a specified amount, it is meant to be shown third parties conveying the intimation to them that there is a binding contract whereby the bank will accept the bills of exchange drawn on it by the grantee up to the specified amount. If any person acts on the letter, e.g. by discounting the bill drawn by the grantee and paying for it, he can force the bank to accept and pay for it. Where a bank grants a letter of this kind to a customer, the letter usually provides that the customer can draw bills only against the actual shipments of goods, bills of lading or other documents of

title and that the acceptance of bills drawn by the customer is conditional upon the forwarding of such titles to the bank. Any person presenting a bill, drawn by the customer on the authority of such a letter, to the bank for acceptance, must, therefore, see that the documents of title reach the bank before the time it is called upon to accept, for, otherwise, the bank will not be liable to accept the bills so presented without the documents. A letter of credit with a condition about documents is called a "*documentary letter of credit*". If such a letter of credit describes the goods against which the bills are to be drawn, the bank is not bound to accept the bills if the goods shipped do not correspond exactly with the description given in the letter whether they are considered to be the same in the market or not.

A person who acts on a documentary letter of credit, e. g. one who discounts the bill drawn by the customer and receives the documents or an indorsee from him, does not require any right or title to the goods to which the documents relate. His right is against the bank and the drawer personally. But the bank acquires a lien and the right of a pledgee over the goods on its acceptance of the bill and the receipt of documents. So if the customer fails to pay for the bill at maturity after the bank's acceptance and the bank has to pay the acceptance, the bank may realise the amount of the bill paid by it by selling the goods. But it seems that before selling the goods, the bank should give notice to the customer to pay the money within a reasonable time and if the customer makes the fault, the bank may sell the goods and realise the amount paid.

Letters of credit are *not negotiable*. Therefore, a person who pays money or extends credit to any one other than the grantee of the letter, cannot recover the money so paid from the bank which issued the letter. If the grantee has paid or deposited money with the bank which issued the letter for obtaining it, he

may recover any money paid wrongly or mistakenly by the issuing bank to any other person who might have obtained or used the letter by fraud or any other offence.

Letters of credit which are issued to travellers in foreign countries, are usually of the following varieties, namely, (1) circular letters of credit, (2) circular notes and (3) traveller's cheques

A '*circular letter of credit*' is usually in the form of a request by a bank to its agents and correspondents in foreign countries to honour the cheques and drafts of the grantee up to a specified amount which the issuing bank undertakes to honour on presentation. These letters are obtained either by paying or depositing cash to the issuing bank or giving a guarantee for the payment of the amount of cheques or drafts which the issuing bank undertakes to honour. A circular letter of credit is known as a '*guarantee letter of credit*' where it is obtained by the grantee by furnishing guarantee for the amount. A '*circular note*' is akin to a circular letter of credit excepting that it is generally for a certain round sum in the currency of the country of the issuing bank and is accompanied by a letter of indication '*Traveller's cheques*' are akin to circular notes and are current for a fixed period and are always signed by the holder at the time of issue and signed again in the presence of the person who is requested to pay at the time of payment.

### **Discounting Bills.**

Apart from collecting and paying bills on behalf of customers, one of the most important functions of a modern bank is the discounting of bills brought to it by a customer or anyone else. In performing this function the bank renders most valuable service to the commercial world at large. The following example will illustrate it. A exports 100 bales of wool of the value of Rs. one lakh from Delhi to B in London. Between the date on which he consigns the wool and

the date on which it reaches B and payment is realised thereon, a long time may elapse during which A's money will be locked up without any chance of being invested in further business. A might have to sit idle during this time unless he has sufficient funds at his disposal. To obviate this difficulty A draws a bill of exchange on B for Rs 1 lakh payable at sight or after sight, as soon as the goods are shipped. He then goes to his bank with the bill and bills of lading and other documents evidencing the consignment of the goods. The bank, if satisfied with the genuineness of the bill, discounts the bill by paying A the amount of the bill less a certain sum which is known as the discount charge or the rate of discount, and after returning the bill of lading and other documents. The bank then sends the bill either to its branch or to its agent in London along with the bill of lading and the other documents for presenting it to B for acceptance or payment where no acceptance is necessary. On presentation of the bill to B, B takes the bill of lading and the other documents which alone would give him the right to take delivery of the goods after accepting the bill or paying for the same as the case may be.

A bank is said to discount a bill when it takes a bill at once as a transferee for value. Where the bill is negotiable by mere delivery *e.g.* when it is payable to bearer, the bank becomes the holder in due course by discounting the bill, even without the endorsement of the customer, if it takes the bill without notice of any defect in the customer's title, if any, and it can sue the drawee or acceptor or the drawer of its own right. But if the bill is payable to order it can be negotiated only by indorsement and delivery and without the indorsement of the customer the bank will merely be a transferee for value and not a holder in due course. The difference between a transferee for value and holder in due course is that a transferee cannot issue on the bill in his own name, nor can it negotiate it to a third party until the transferor indorses the instrument.

The right of the transferee is like that of an assignee of the ordinary chose-in-action and if he has paid value for the transfer he acquires the right to compel the transferor from whom he has taken the instrument to pay his indorsement which may be enforced by suit if the transferor refuses to do so.

When a bank receives a bill from a customer it is a question of fact in every case as to whether the bill is taken for collection or as security for a loan or overdraft or for discount. Where the bank receives the bill for collection, the bank does not become a holder in due course or transferee for value and it remains liable to the true owner of the bill in case the customer's title to the bill proves defective. But even in the case of a bill paid in for collection, the bank will not be liable to the true owner after it becomes the holder in due course in respect of the bill unless the bill has been negotiated by forged indorsement. Where, however, a bank receives a bill from a person who is not a customer, the presumption is that the bill has been discounted. A bank becomes a holder in due course of a bill discounted by it by the mere delivery thereof, if it is payable to bearer and by delivery and indorsement, if it is payable to order provided it has no notice of any defect in the title of the person paying in the cheque. If the bank is the holder of a bill in due course it will not be liable to the true owner if the transferor's title proves defective except in the case of forged indorsement by the transferor or someone from whom the customer took the bill. But the bank will be liable to the true owner if it discounted the bill payable to order without a proper endorsement; for in such a case, the bank will be a mere transferee for value or assignee and not a holder in due course and an assignee takes the consignment subject to all defects in the title of the assignor.

In the case of dishonour of a bill discounted by a bank for its customer, they can debit the customer's

account with the amount of the bill, where the customer's indorsement is on the bill. Where the customer's indorsement is not on the bill, the bank cannot debit the customer's account and has to proceed with the ordinary remedies of transferee for value.

A bank cannot also retain moneys due to a customer as a cover against and in anticipation of, the risk of any bill discounted for the customer being dishonoured on maturity. It seems, however, that the bank can do so in the event of the customer's insolvency before the maturity of the bill. The reason appears to be that in the event of the customer's insolvency all the properties and assets of the customer will vest in the Official Assignee or Receiver as the case may be including the moneys in the hands of the bank subject to the lien of the latter, if any, existing at the moment. But the bank has no lien on the moneys for any prospective dues which the bank may have in case the bill is dishonoured at maturity. If the money is handed over to the Official Assignee or Receiver and then the bill is dishonoured, the bank will have nothing to claim a lien on after the dishonour of the bill. Therefore, it seems reasonable that in such a case the bank may retain a sufficient sum to cover against any prospective loss which may be caused by the dishonour of the bill.

### **Safe custody of valuables**

As already stated, the position of a banker accepting deposits of property or valuables for safe custody is like that of a bailee. As such he is bound to take as much care of the goods deposited with him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same description. In the absence of any such contract, his liability is not like that of an insurer as to make him liable to the owner for any loss or damage to the goods. If he takes the amount of care mentioned above he will not be liable for the loss, destruction or deterioration of the

goods unless he agrees to accept for value any higher liability at the time of deposit. An acknowledgment of the banker that he received the goods for "safe custody" does not make his liability any the higher. He is not also liable for the criminal act of his employees for which there was no ground for anticipating. If he knowingly employs a dishonest person he would be answerable for the latter as in employing such a person he cannot be regarded as exercising the amount of care which is required of him. He would also be liable to the owner if he delivers the goods to a wrong person. This would be so if he is not negligent and the goods are obtained from him by means of an order to which the owner's signature has been forged. That is why the bank is entitled to refuse delivery of goods and retain them until he is satisfied about the identity of the person or the genuineness of the order requiring delivery where the bank is suspicious about such identity or genuineness.

### **The banker's lien.**

A banker may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods deposited with him by a customer if the customer is indebted to the bank on such a general balance of account. This right to retain the property of another for a general balance of account is known as a *general lien* as opposed to a *particular lien* e.g., that of an artificer for his charge on account of labour employed or expenses bestowed upon the identical property retained. This general lien was originally established in England, as regards bankers and others, as a proved usage of trade and at once became a part of the law of merchant as judicially recognised. A banker's lien extends to all bill and cheques paid in for collection and to all securities deposited with the banker by a customer (including share certificates, a pay order, a policy of insurance, and a lease) or by a third person on a customer's account and to money paid in by or to the account of a customer, unless there be a

contract, express or implied, excluding the lien. An agreement excluding the general lien may be expressly provided for or may be implied as when securities are paid in to secure overdrafts upto a specified limit. In such a case the bank cannot claim a lien for any amount exceeding the limit. Similarly, he cannot claim a lien on cheques or bills which are paid in specifically for providing funds to meet cheques drawn by the customer or bills accepted by the bank on behalf of the customer, for the bank received such cheques or bills for a specific purpose which impliedly excludes the general lien. But it seems that the banker's lien will attach to securities paid in for a specific purpose *e.g.*, to secure an overdraft or to meet a particular cheque if they remain with the bank after such overdraft or cheque has been paid off, though doubts have been expressed whether the bank can claim a lien on the securities in such a case.

Where bills or cheques are paid into a bank, a question arises whether the bank receives them as an agent of the customer or as a transferee which makes it a holder in due course. We have already seen under what circumstances the bank will be regarded as a transferee. If the bank receives them as a transferee no question of lien arises, for the bank is entitled to the whole of the proceeds. But if the bank receives them as an agent of the customer, it has a lien on them to the extent of the customer's indebtedness to the bank, if any. But where the bank has a lien it becomes a holder in due course in respect of cheques or bills or a promissory note payable to bearer to the extent of the lien and in such a case the bank can sue for the whole amount of the bill or cheque in case it is dishonoured, holding any surplus over the customer's indebtedness for the customer.

A bank receiving a cheque or bill or note from a customer must present it for acceptance or payment whether it claims a lien in respect thereof or is a transferee for value thereof,



In the absence of an agreement to the contrary whether express or implied, a banker is entitled to combine all the different accounts kept by the customer in the same right (*i.e.*, not in different capacities as when he has a personal account and another as a trustee), whether deposit or current, or whether at the same branch or different branches, and to exercise his lien on the resulting balance.

In order to be entitled to claim a lien the bank must receive the securities or bills on which the lien is claimed as a banker acting in the course of banking business. Thus the bank cannot claim on securities or valuables deposited with it for safe custody for it receives them not as a banker but as a bailee. Nor can the bank claim a lien on title deeds casually left at the bank after a refusal by it to advance money on them.

The banker's lien is not like the ordinary lien which is only a positive right. It gives the banker the right of a pledgee so as to enable him to sell the negotiable instruments or securities on which he has the lien in case the customer fails to repay his debts within the time fixed or where no time is fixed after a reasonable notice to the customer to pay and the failure of the customer to pay within the time fixed by the notice.

## CHAPTER VIII

# PARTNERSHIP

### Partnership defined

A party may trade and enter into contracts by himself or he may associate with himself others. A person is not obliged by law to transact business solely by himself. He is permitted, for the purpose of having labour, capital and skill joined in one enterprise, to combine with others. Where a person joins with himself one or more persons for the purpose of transacting business as a unit, the firm composed of the two or more persons thus joined is called a *Partnership*.

A 'partnership' is thus defined as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name". The definition of 'partnership' thus contains three elements.

(1) there must be an agreement entered into by all the persons concerned, (2) the agreement must be to share the profits of a business, and (3) the business must be carried on by all or any of the persons concerned, acting for all.

*There must be an agreement between "persons"* - Partnership is a relation which subsists between persons. Hence, strictly speaking, there cannot be a partnership when the relation subsists between persons and firms or firms and firms. As one firm cannot be a partner in another firm, if these firms agree to combine their property, labour or skill in some business, they cannot be considered to be partners. But a firm is nothing but an

association of individuals, and when such an association under a firm name enters into partnership with another individual or another association of individuals, it is not the aggregate that combines with the individuals but the individuals composing that aggregate. Hence a partnership between a firm and an individual is in law a partnership between the individuals who compose the firm and the individual. Similarly, when one firm enters into an agreement of partnership with another, all the individual partners of the two firms become partners individually in the new firm, and partners as individuals may be partners in another firm by the use of their firm name,

*A joint Hindu family* cannot be a partnership of itself, nor can two joint families be brought into relation with one another by an agreement to be a partnership. But there can be a partnership between the managing member of one joint family and the manager of another family, the partnership being between two persons and not between the families.

Under the *Mohammadan law*, the moment a wakf is created all the rights of property vest in the Almighty and the Mutwalli is merely a manager having no vested right in the wakf property. A non-personal being such as the Almighty is, obviously not in a position to enter into relationship with material persons for the sharing of profits of a business and therefore any partnership which purports to exist with a wakf as a partner can be no partnership in law.

*To constitute partnership there must be business*—The expression “business” includes every trade, occupation and profession. A, B and C buy a few houses together as joint owners. They collect the rent and share it between themselves. The relation between A, B and C is not one of partnership, for there is no business with which they are associated. It is true that as man may be “busy” in managing his own property, collecting rent, supervising repairs, planning improve-

ments, etc., and this may be his only "occupation", but it does not always follow that this is a "business", so that if two co-owners were so engaged they would not necessarily be partners

*There must be an agreement to share profits*—To constitute 'partnership,' the business must be carried on with a view to sharing its profits. Hence a society for religious or charitable purposes is not a partnership. It is not essential to constitute a partnership that the partners should agree to share the losses. The element of sharing losses may be regarded as consequential upon the sharing of profits. Receipt of a share of gross returns, as distinguished from receipt of a share of profits, is not even *prima facie* evidence of partnership. Thus, if two co-owners of a race horse agree that one of them should have the management of the horse and defray the expenses in the first instance but that the expenses and winnings should be equally divided between them, there is no partnership. Nor would there be a partnership if two tenants in common of a house agree that one of them should have the general management and provide funds for repairs and divide the rents equally between them. Similarly, an agreement to share gross returns does not make a proprietor of a theatre who pays the expenses a partner of his lessee who is in the management.

The sharing of profits is *prima facie* evidence of partnership, but the receipt of a share of profits, or of a payment varying with the profits of a business, does not *of itself* make the recipient a partner in the business. This means that the sharing of profits, without more, proves a partnership, but this may be rebutted by proving other facts which show that the parties did not intend to be partners. In particular, there is no partnership in the following cases —

(a) Where a person receives a debt or other liquidated amount by instalments out of the profits of a business

(b) Where a servant or agent is engaged in a business and is remunerated by a share in the profits.

(c) Where a widow or child of a deceased partner receives a portion of the profits by way of annuity.

(d) Where a person has lent money to a person engaged or about to engage in business, and receives a rate of interest varying with the profit or a share of the profits

(e) Where a person has sold the goodwill of a business, and in consideration of the sale receives a portion of the profits

If losses as well as profits are shared, the evidence of partnership is stronger, but it is not conclusive, and in every case the question of partnership depends on the intention of the parties.

Executors carrying on business under the terms of their testator's will are not partners.

*There must be "acting for all"*— This brings out the fundamental principle that persons who share the profits of a business do not incur the liabilities of partners unless that business is carried on by themselves personally or by others as their real or ostensible agents. Thus, an assignment of the profits of a business upon trust to another to take a certain amount out of the profits and pay the residue to the assignor with a power to the assignee to act for the assignor in the business did not make the assignee a partner because it was the assignor's business and he had no authority to bind the assignee. Similarly, no relationship of partnership arose where a debtor assigned his property to trustees for the benefit of his creditors and carried on his trade under their control, because there was no relationship of principal and agent between them and the debtor was the master and the trustees were only inspectors and controllers.

### **Creation of partnership.**

Partnership is the result of voluntary agreement. It is brought into existence by agreement or contract between persons who agree to become partners in a business. This agreement need not be in writing and the terms of partnership may be proved by oral evidence. Most partnerships arise by express agreement. But express agreement is not absolutely necessary to create a partnership. If the relationship between persons is such as in law to create a partnership, the agreement to form a partnership will be implied even though the parties expressly deny that a partnership was intended.

Generally, where the business is large, the partnership contract is reduced into writing and very generally the terms are embodied in a deed. This deed is known as the articles of partnership. The articles generally contain the following particulars: (1) The name of the firm; (2) The nature of the business; (3) The duration of the partnership where such duration is fixed; (4) The management of the business; (5) The keeping of accounts; (6) The authority for signing cheques; (7) The provision as to the death or retirement of a partner; (8) The keeping and examination of accounts.

As the relation arises from contract, the agreement to be valid must be certain or capable of being made certain. Therefore where the date of the commencement of a partnership is not agreed upon, there is no partnership even though the parties perform several actions in the expectation of creating a partnership. On the same principle, it would be illogical to hold that a contract of partnership exists where the name of the persons who were parties to the contract could not be established with certainty.

*Joint Hindu family business and partnership:* The law specifically declares that the members of a Hindu undivided family carrying on a family business as such

or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business. A Hindu joint family business, not being a case of ordinary partnership arising out of contract, is a case of joint ownership in trading business, created through the operation of Hindu law between the members of an undivided Hindu family. The *points of difference* between a partnership and a joint Hindu family business are :

(1) Partnership can only be created by contract. When several persons *agree* to join each other in a partnership business a partnership is created. But a joint Hindu family business is not the creation of contract. Persons become members of a joint family business because they are born in a joint family which happens to own a business. Membership in a joint family business is the result of status and not of contract.

(2) The death of a member of joint family, *i.e.* a coparcener, or even of the managing member, does not dissolve the business, and the property in the business passes by survivorship to the surviving members like any other form of joint family property. But a partnership is dissolved by the death of any one partner unless there is a contract to the contrary contained in the articles for the continuance of the business by the survivors.

(3) A minor member of a joint family business becomes a member from the moment of his birth by virtue of his status. But in a partnership a minor cannot become a partner. He can be admitted only to the benefits of the partnership by agreement between the partners.

(4) A partner is entitled to ask for an account of past profits when he severs his connection from the partnership. But a coparcener cannot ask for an account of past profits where he severs his connection from the family business or when he sues for a partition of the family business.

(5) The rights and liabilities of the coparceners

*inter se* and also in respect of the joint family trade or business are governed by Hindu Law. But the rights and liabilities of partners in respect of the partnership are governed by mutual contract subject to the Indian Partnership Act.

### Firm name

The partnership firm may carry on its business under any name it chooses, this name may either be the name of the one or more of its members, or a combined title embracing the names of all, or may be made up of a designation entirely different from the names of the members composing it. The name under which the business of a partnership is carried is called the "*firm name*". In law, a partnership has no distinct existence like that of a joint-stock company, *ie* an existence distinct and independent of the members composing it.

The name of a firm is only a convenient mode of designating the firm composing it, and variation among these persons is productive of a new significance of the name. If, therefore, a legacy is left to the representative of an old firm, it will be payable to the executors of the last surviving partner constituting it and not to its successor in business. The firm's name, therefore, is only the title under which the partners are supposed to trade and all that can be claimed for it is that by a continuous use of that name in the long course of trading a good will may be acquired which may be of value. There is nothing to prevent other persons from using a similar name unless it can be shown that the use of such name would deprive other persons of the advantage of their good-will by creating an incorrect impression on the minds of people that the persons represented by that name are the same parties as those making up the old firm whose name they are copying. This is a question of evidence to be decided in each case on its own merits.



### Partnership at will

Where no provision is made by contract between partners for the duration of their partnership, or for the determination of their partnership, the partnership is "*partnership at will*". Where the duration of the partnership is provided for in the partnership agreement, *e.g.* where there is a provision that the partnership should be terminated by mutual agreement only, it is a partnership for fixed term. Hence, a partner of such partnership cannot retire by merely giving notice to the other partners as if it were a partnership at will

### Particular partnership.

A person may become a partner with another person in particular adventures or undertakings. This is particular or special or limited partnership as distinguished from universal or general partnership. The general incidents of partnership are the same in both cases, but in particular partnerships, the rights and liabilities of the parties are necessarily limited to particular adventures or undertakings. Thus two solicitors may be partners in so far as a particular case is concerned when they agree to share the profits accruing therefrom.

### Relations of partners to one another.

As partnership is the creation of contract between the partners, the relations of partners to one another may be wholly governed by the terms of the partnership agreement. Thus A, B and C agreeing to form a partnership may agree that A will sign cheques and bills, B will have the right to expel any partners he thinks fit, and C will look after the purchase and sale of the business and so on. But whatever may be the terms of the agreement, or in the absence of any written agreement, at all, the following conditions are imposed by law on every such contract.

(1) *Good Faith*. Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to

each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative. The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arises between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has law on his side, but that his conduct will bear to be tried by the highest standard of honour

One of several partners may purchase the share of another for his own benefit of the firm. But in a transaction between co-partners for the sale by one to the other of a share in the partnership business, there is a duty cast upon the purchaser who knows and is aware that he knows more about the partnership accounts than the vendor to put the vendor in possession of all material facts with reference to the assets and not to conceal what he alone knows. Unless such information is furnished the sale is voidable and may be set aside. Similarly, where a contract is entered into by one partner with another in relation to the interest of the partnership, the partner is under a duty to make a full disclosure of all the material facts which he knows and which would assist the other parties in deciding whether or not to enter into the contract. So a partner is entitled to purchase partnership property provided there is full disclosure and the parties are at arm's length; it is only where the real truth is concealed and the facts are not disclosed that one partner has a legitimate grievance against the other.

For the same reason, even where a partnership agreement provides that a partner may be expelled for breach of certain specified articles, the other partner cannot actually expel a partner according to his clause except in good faith. It has accordingly been held that such a clause will not justify the expulsion of a partner where the motive for the expulsion is really to pur-

chase the interest of the expelled partner on unfavourable terms

(2) *Duty to indemnify*. Every party is in duty bound to indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm. This is based on the principle that if one partner does that which, though imputable to the firm on the principles of agency, is in trust his act alone, and a fraud upon his co-partners, they are entitled, as between themselves and him, to throw the whole of the consequences upon him. Thus, where A, B and C are partners in a business of stockbrokers, and A buys certain shares from his brother at a ridiculously high price, and the shares go down in price and the firm suffers loss, A must indemnify the firm for the loss.

### **Determination of rights and duties of partners by contract between the partners.**

Apart from the above two provisions, the partners may regulate their relations in any way they like by contract of agreement between themselves. Such contract may be express or may be implied by a course of dealing. It may be varied by consent of all the partners, and such consent may be express or may be implied by a course of dealing. And in particular, notwithstanding the general provisions contained in the Indian Contract Act, such contracts may provide that a partner shall not carry on any business other than that of the firm while he is a partner.

Where there is no contract or where a contract exists but it does not cover all the aspects of the relation between partners, the following rules, as enacted by the Partnership Act, will be deemed to regulate and govern the relation of partners between one another.

#### **(1) The conduct of business**

Subject to contract between partners—

(a) every partner has a right to take part in the conduct of the business;

(b) every partner is bound to attend diligently to his duties in the conduct of the business,

(c) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners, and

(d) every partner has a right to have access to and to inspect and copy any of the books of the firm.

### **Mutual rights and liabilities.**

Subject to contract between the partners—

(a) a partner is not entitled to receive remuneration, for taking part in the conduct of the business,

(b) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm,

(c) where a partner is entitled to interest on the capital subscribed by him such interest shall be payable only out of profits,

(d) a partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six per cent per annum; from the date of advance,

(e) the firm shall indemnify a partner in respect of payment made and liabilities incurred by him—

(i) in the ordinary and proper conduct of the business, and

(ii) in doing such act in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances; and

(f) a partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm.

**(3) Personal profits earned by partners**

Subject to contract between the partners,—

(a) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm;

(b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.

**(4) The property of the firm.**

(a) Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired by purchase or otherwise, by or for the firm, or for the purposes and in the cause of the business of the firm, and includes also the good will of the business.

Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm.

(b) Subject to contract between the partners; the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

**Mutual rights and duties of the partners after a change or after the expiry of the term of the firm, or where additional undertakings are carried out**

Subject to contract between the partners,—

(a) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be,

(b) where a firm constituted for a fixed term continues to carry on business after the expiry of that

term ; the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership at will , and

(c) where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings

### Relations of partners to third parties

A partner is the *agent* of the firm for the purposes of the business of the firm. As between the partners and the outside world (whatever may be their private arrangement between themselves), each partner is the unlimited agent of every other in every matter connected with the partnership business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership 'Partners may stipulate among themselves that some of them only shall enter into particular contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made, but with such private arrangements third persons dealing with the firm without notice have no concern'

#### *Implied authority of partner as agent of the firm*

The act of a partner which is done to carry on, in the usual way business of the kind carried on by the firm, binds the firm This is called his "*implied authority*" The partners are collectively liable for the acts or defaults of each of them in that each partner is *prima facie* the agent of the firm and of each of his co-partners for the purpose of the business of the partnership. This does not mean, however, that a partner can bind the firm or his co-partners for all acts that he may do on his own behalf. A transaction entered into by one partner on behalf of the firm is binding on the firm and makes every partner liable, provided the following con-

ditions are satisfied:

(a) The transaction is related to the normal business of the firm. Thus, if A and B carry on business as partners in a wine shop, a contract signed by A in the firm name to supply books would not be binding on the firm or B unless it is made with the express authority of B, for the supplying of books is not connected with the normal business of a wine shop.

If the person dealing with the partner in a matter lying outside the ordinary business of the firm wishes to hold the firm liable, he must ascertain that the acting partner had express authority to bind the firm in the particular transaction. But even if there was at the time no express authority, the firm may subsequently ratify an act *done on their* behalf and so make themselves liable.

(b) The transaction must be an act for carrying on business in the usual way. This is a question of fact which depends upon two considerations *viz*, (1) the nature of the business and (2) the general custom of the trade. A partner can pledge or sell or buy goods, contract or pay debts, draw, make, sign or indorse bills of exchange on behalf of the firm for carrying on business in the usual way.

(c) The transaction must have been carried out by the partner in the firm name or as a partner, contracting on that basis or in any other manner expressing or implying an intention to bind the firm.

(d) The transaction must be one which the partner has either express or implied authority to execute. If it is an act forbidden by other partners and if the third person with whom the partner enters into the transaction knows of the restriction, the act will not bind the firm.

*Nature of liability*— The liability in contract of the partners is a joint and several liability, whether the contract is executed by one partner or all of them to-

gether. The result is that in case of a branch of contract, the third party injured can sue any one partner, or all the partners jointly, and upon judgment if damages are realised from any one partner, he is always entitled a get rateable contribution from his co-partners

### **No implied authority of a partner.**

In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to —

(a) submit a dispute relating to the business of the firm to arbitration,

(b) open a banking account on behalf of the firm in his own name,

(c) compromise or relinquish any claim or portion of a claim by the firm,

(d) withdraw a suit or proceeding filed on behalf of the firm,

(e) admit any liability in a suit or proceeding against the firm,

(f) acquire immoveable property on behalf of the firm,

(g) transfer immoveable property belonging to the firm, or

(h) enter into partnership on behalf of the firm

### **Extension and restriction of partner's implied authority.**

The partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner. *Notwithstanding any such restriction*, any act done by a partner on behalf of the firm, which falls within his implied authority binds the firm, unless the person with whom he is dealing knows of the restriction or does not know or believe that partner to be a partner.



### **Partner's authority in an emergency.**

A partner has authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.

### **Effect of acts by partners**

(a) An *admission* or *representation* made by a partner concerning the affairs of the firm is evidence against the firm, if it is made in the ordinary course of business.

(b) *Notice* to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

(c) Where by the *wrongful act or omission of a partner* acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the partner

(d) Where—

(i) a partner acting within his apparent authority receives money or property from a third party and *misapplies* it, or

(ii) a firm in the course of its business receives money or property from a third party, and the money or property is *misapplied* by any of the partners while it is in the custody of the firm,

the firm is liable to make good the loss

### **Partner by holding out**

Any one who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to any one who has on the faith of any such representation given credit to the firm, whether the person representing himself or

represented to be a partner does or does not know that the representation has reached the person so giving credit.

The rule of liability by holding out is a branch of the law of estoppel. Where a man holds himself out as a partner, or allows others to do it, he is then properly estopped from denying the character that he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel. A's name is used as or partner by the firm BC in its business dealings. A comes to know of it but does not take any step to stop the use of his name or to warn the public about it. A's silence in this case {will amount to "holding out"

It should be noted, however, that where after a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death. The same may, however, become liable if the legal representative becomes guilty of holding out.

### **Rights of transferee of a partner's interest**

(i) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners

(ii) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferr-

ing partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

### **Minor as a partner.**

As has already been noted, a minor cannot contract. A minor cannot therefore become a partner in a firm. But with the consent of all the partners for the time being, he may be admitted to the benefits of partnership. Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm. Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act. Such minor may not sue the partners for an account or payment of his share of the property of the firm, save when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules laying down the mode of settling accounts between partners

All the partners acting together or any partner entitled to dissolve the firm upon notice to other partners may elect in such suit to dissolve the firm, and thereupon the Court shall proceed with the suit as one for dissolution and for settling accounts between partners, and the amount of the share of the minor shall be determined along with the shares of the partners

### **When a minor can become a partner.**

A minor admitted to the benefits of a partnership may, within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, give public notice that he has elected to become or that he has elected not to become a partner in the firm. If he elects to become a partner he will become partner and if he elects not to become a partner he will cease to be a partner. But if he fails to give such

notice, he will become a partner in the firm on the expiry of the said six months. When a minor becomes a partner in the above way

(a) his rights and liabilities as a minor continue upto the date on which he becomes a partner, but he also becomes *personally* liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and

(b) his share in the property and profits of the firm after he becomes a partner shall be the share which was given to him by the consent of all the other partners at the time of his admission into partnership business.

When a minor elects not to become a partner .

(a) his rights and liabilities shall continue to be those of a minor upto the date on which he gives public notice,

(b) his share shall not be liable for any acts of the firm done after the date of the notice, and

(c) he shall be entitled to sue the partners for his share of the profits when he severs his connection with the firm

### **Duration of partnership.**

Unless a partnership is dissolved in the meantime a partnership will continue for whatever period of time is specified in the agreement, or where the partnership is for carrying out a particular venture, until the completion of that venture. Where no time is specified at all the partnership will be a *partnership at will*, and in this case any partner can dissolve the partnership by giving notice to all the other partners. This notice may be either oral or in writing.

### **Reconstitution of a firm.**

A partnership firm is said to be reconstituted when any of the following changes occurs :

(1) *Introduction of a new partner* A new partner can

only be introduced if the contract of partnership provides for it, otherwise all the partners must agree to the introduction of the new partner. Thus, if an existing partner sells his share in the partnership, the purchaser of his share does not become a partner unless all the other partners agree.

A new partner does not, in the absence of special agreement, become liable for the debts of a firm existing before he became a partner. He is liable only for those debts which have been incurred after he became a partner.

(2) *Retirement of a partner* A partner may retire (i) with the consent of all the other partners, (ii) in accordance with an express agreement by the partner, or (iii) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire

The following rules will apply;

(a) A retiring partner does not in the absence of agreement cease to be liable for the debts of a firm incurred while he was a partner.

(b) A retiring partner may still be liable as an apparent partner of the firm in respect of all debts incurred, to old customers of the firm, even after his retirement, unless such old customers have had actual notice of his retirement.

(c) As regards new customers doing business for the first time with the firm after the retirement of the retiring partner, the retiring partner is exonerated from all liability if he gives a public notice of his retirement.

(d) All the above three rules may be modified by special agreement between partners or between customers and the partners.

(3) *Expulsion of a partner:* A partner cannot be expelled from a firm by any majority of the par-

tners, *save* in the exercise in good faith or powers conferred by contract between the partners. The *liability* of an expelled partner is just the same as that of a retiring partner

(4) *Insolvency of a partner.* Where a partner in a firm is adjudicated an insolvent he ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is thereby dissolved. Where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made

(5) *Death of a partner.* A partnership is dissolved by the death of a partner unless the contract of partnership provides otherwise. Where the partnership is not dissolved, the estate of the deceased partner is not liable for the debts of the firm incurred after his death. But where the partnership is dissolved the estate of the deceased partner is liable for the acts of the firm done before his death

### **Rights of outgoing partner.**

An outgoing partner may carry on a business competing with that of the firm and he may otherwise advertise such business, but, subject to contract to the contrary, he may not (a) use the firm name, (b) represent himself as carrying on the business of the firm, or (c) solicit the custom of persons who were dealing with the firm before he ceased to be a partner

A partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits; and, notwithstanding anything contained in the Indian Contract Act, such agreement shall be valid if the restrictions imposed are reasonable.

Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent. per annum on the amount of his share in the property of the firm:

Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material aspects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

### **Revocation of continuing guarantee by change in firm.**

A continuing guarantee given to a firm, or to a third party in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions from the date of any change in the constitution of the firm.

### **Dissolution of a firm.**

The dissolution of partnership between all the partners of a firm is called the *dissolution of the firm*. When a firm is dissolved, it ceases to function as a partnership. A firm is dissolved:

- (a) by the adjudication of all the partners or

of all the partners but one as insolvent, or

(b) by the happening of any event (for instance declaration of war against an alien enemy) which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership. This is subject to the *proviso* that, where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings.

*Subject to contract between the partners*, a firm is also dissolved on the happening of the following contingencies

(a) if constituted for a fixed term, by the expiry of that term.

(b) if constituted to carry out one or more adventures or undertakings, by the completion thereof,

(c) by the death of a partner, and

(d) by the adjudication of a partner as insolvent.

Where the *partnership is at will*, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm. In this case, the firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

*Dissolution by the court* — At the suit of a partner, the court may dissolve a firm on any of the following grounds, namely —

(a) that a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner;

(b) that a partner, other than the partner suing,



has become in any way permanently incapable of performing his duties as partner,

(c) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business,

(d) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him;

(e) that a partner, other than the partner suing, has in any way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under the provisions of rule 49 of Order XXI of the First Schedule to the Code of Civil procedure, 1908, or has allowed it to be sold in the recovery of arrears of land-revenue of any dues recoverable as arrears of land-revenue due by the partner,

(f) that the business of the firm cannot be carried on save at a loss; or

(g) on any other ground which renders it just and equitable that the firm should be dissolved.

### **Effect of dissolution.**

The rights and obligations of partners on dissolution are as follows :—

(1) Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution

Provided that the estate of a partner who died, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing

with the firm to be a partner, retires from the firm, is not liable for acts done after the date on which he ceases to be partner

Public notice may be given by any partner

The following illustrations will be a helpful in the elucidation of the above points .

(a) A and B, partners in trade, agree to dissolve the partnership and execute a deed for that purpose, declaring the partnership dissolved as from 1st January, but they do not discontinue the business of the firm or give notice of the dissolution. On 1st February, A indorses a bill, in the partnership name, to C, who is not aware of the dissolution. The firm is liable on the bill

(b) A bill is drawn on a firm in its usual name of the M Company, and accepted by an authorised agent. A was formerly a partner in the firm, but not to the knowledge of B, the holder of the bill, and ceased to be so before the date of the bill. B cannot sue A upon the bill

(c) A is a partner with other persons in a bank. A dies, and the survivors continue the business under the same firm. Afterwards the firm becomes insolvent. A's estate is liable to customers of the bank for balances due to them at A's death, so far as they still remain due, and for other partnership liabilities incurred before A's death ; but not for any debts contracted or liabilities incurred by the firm after A's death

(2) On the dissolution of a firm every partner or his representative is entitled, as against all other partners or their representatives to have the property of the firm applied in payment of the debts and liabilities of the firm and to have the surplus distributed among the partners or their representatives according to their rights .

This involves amongst others the right to account and to have a receiver appointed of the assets of the firm for the purpose of preserving the assets of the

firm until accounting to completed and the assets distributed.

(3) After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution. but not otherwise:

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent: but this proviso does not relieve the liability of any person who has after the adjudication represented himself or knowingly premitted himself to be represented as a partner of the insolvent.

(4) If a partner dies and the firm is dissolved, any profit, secret or otherwise, secured by the surviving partner or the representative of the deceased partner in course of winding up must be thrown into the common fund and share.

(5) Where a partner has paid a premium on entering into partnership for a fixed term and the partnership is dissolved before the term, he is entitled to recover his premium unless the dissolution is due to death of one of the partners or to his own misconduct or is in pursuance of an agreement containing no provision for the return of premium paid.

#### **Application of the assets of a firm on dissolution:**

In settling accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed:

(a) Losses, including deficiencies of capital, shall be paid first out of profits, next out of capital and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

(b) The assets of the firm, including any sums con-

tributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order —

- (i) in paying the debts of the firm to third parties,
- (ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital,
- (iii) in paying to each partner rateably what is due to him on account of capital, and
- (iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits

Where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm

#### **Fraud or misrepresentation in contract of partnership.**

Where a contract creating partnership is rescinded on the ground of the fraud or misrepresentation of any of the parties thereto, the party entitled to rescind is, without prejudice to any other right entitled—

- (a) to a lien on, or a right of retention of, the surplus of the assets of the firm remaining after the debts of the firm have been paid, for any sum paid by him for the purchase of a share in the firm and for any capital contributed by him,
- (b) to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm, and



(c) solicit the custom of persons who were dealing with the firm before its dissolution

(3) Any partner may, upon the sale of the goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits, and, notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable

### **Registration of firms**

Registration does not create a partnership. It is the contract between the partners which creates a partnership. Registration is only a concrete and reliable evidence of the existence of a partnership. When a firm is registered, the partners cannot deny the partnership to avoid liability. Thus, it affords protection to persons dealing with the firm. But the statute does not make registration compulsory. It simply provides that an unregistered firm shall suffer from certain disadvantages which are as follows :

(1) An unregistered firm cannot sue any third party to enforce any claim arising out of contract and exceeding the sum of Rs. 100/-

(2) A partner of an unregistered firm cannot sue his copartners to enforce his rights as a partner excepting when he sues for the dissolution of the firm or for accounts

These disadvantages do not, however, attach to a firm whose place of business is outside British India

### **Formalities of registration.**

A firm must apply to the Registrar of firms for registration. Each province appoints its own Registrar. The application for registration should be accompanied by the prescribed fee of Rs. 3/, and it should contain a statement of the following particulars

- (a) the firm name,
- (b) the place or principal place of business of the firm,
- (c) the names of any other places where the firm carries on business,
- (d) the date when each partner joined the firm,
- (e) the name in full and permanent addresses of the partners, and
- (f) the duration of the firm.

The statement must be signed by all the partners or by their agents specially authorised in this behalf. A firm name must not contain words like Crown, Emperor, Imperial, Royal, Empress, King, Queen, Empire, or words expressing or implying the sanction, approval or patronage of the Crown or the Central Government, or any Provincial Government or the Crown Representative, except when the Provincial Government signifies his consent to the use of such words as part of the firm name by order in writing

Where the Registrar is satisfied that the above provisions have been complied with he shall record an entry of the statement in a register, called the Register of Firms and shall file the statement, and this will amount to registration of the firm. When the name of the firm is changed, or the place of business is changed or any one branch is closed or opened or any new partner is introduced or any old partner retires, all such changes must be notified to the Registrar in a prescribed form and the Registrar will then note the changes in the Register of Firms.

### **Rules of evidence.**

(1) Any statement, intimation or notice recorded or noted in the Register of Firms shall, as against any person by whom or on whose behalf such statement,





## CHAPTER IX

# COMPANY LAW.

### Introductory.

When society is in a primitive state most of the people are farmers, and most of the business consists in the sale or barter of agricultural produce. Here one man and his family can, as a rule, conduct their affairs to as much advantage by themselves as in conjunction with half-a-dozen other men and families. When, however, the progress of society leads to more extensive and intricate transactions, men soon discover it is to their profit to combine their capital and labour to carry these through. This leads to 'partnership'. Finally, when science has come to the aid of industry, undertakings become so gigantic as to lie outside the capacity of individuals. Greater capital and more skill are required for them than can be provided by two or three business friends pooling their own. It is necessary to appeal to the general public to supply the capital, and to select specially qualified officers to supervise the work. This leads to a modern commercial company.

When many people associate themselves in a Company two things stand out: (1) The Company becomes a separate legal entity. Unlike a Partnership it becomes a person in the eye of law, separate in existence from the people who are its share-holders. (2) Unlike a partnership the people constituting a Company do not become responsible for all the liabilities of the Company unless they agree to be so responsible. They are liable, usually, only up to the amount of their shares or any other amount which they fix up by mutual agreement.

### What is a company ?

A company is regarded by the law as a person, just as a human being, Mr Gupta, or Mr Latifi, is a person. It can own property, have a banking account in its own name, owe money to others and be a creditor of other people and other companies, and employ people to work for it. The company's money and property belong to the company and not to the shareholders or the directors, and similarly the company's debts are the debts of the company alone and the shareholders cannot be compelled to pay them. A company, of course, can only act through human agents, and those who control its policy and are responsible for its business activities are called directors. But even the directors, whatever powers they may have given to them by company, are only the servants or officers of the company and can only manage the company's affairs in accordance with the company's directions and the provisions of the Companies Act. This conception of a company as a person separate and distinct from the other persons who are its shareholders and directors should be clearly understood at the beginning.

A company must have members, otherwise it would never exist at all, and these members are called shareholders. The shareholder's position with regard to the company itself and to his fellow shareholders is regulated by the Companies Act and by a number of rules known as the memorandum and the articles of association. These rules vary considerably among different companies, but in every case the shareholder's position is that of the owner of one or more shares in the company. His shares are something which he has bought and paid for—perhaps from the company or perhaps from somebody else and something which he can sell or give away, either in his lifetime or by his will. He cannot, however, get his money back from the company, so long as the company is in existence, because his position is not that of a person who has lent money.

to the company or has deposited his money as with a bank or a building society, it is that of the owner of property, namely, his shares, which can only be turned into money if a buyer can be found to pay for them. Shares are of two kinds, fully paid shares and partly paid shares. When the shares are only partly paid the shareholder can be compelled to pay them up fully if called upon by the company or, if the company is being wound up, by the liquidator.

As companies are usually formed to carry on business, *capital* is necessary. This is provided by the shareholders. The amount of the capital must be registered with the Registrar of Companies, and it is the policy of the Companies Act to see that the capital is preserved intact, except for losses in the way of business, so that it may be available to satisfy the company's creditors. Accordingly, while the company is a going concern no part of the paid-up capital may be returned, either directly or indirectly, by the company to its shareholders.

Shares in companies are extensively bought as an investment by people who want to derive an income from their capital, but who are unable, for reasons of business, age, health, or opportunity, to take any part in the management of the company. To protect investors from dishonest or incompetent people who form companies in which the investors are likely to lose their money, disclosure of such things as the company's past financial record, the profits of the promoters of the company and the benefits of being a director, are required in the prospectus or other document on the strength of which the public are invited to buy shares in the company. Provision is also made for the company's accounts to be audited every year by auditors appointed by the shareholders and for the circulation to every shareholder of an annual balance-sheet certified by the auditors.

A company may become insolvent, or, for

other reasons, may decide to retire from business. In such a case it is said to go into *liquidation* and a person, called a *liquidator*, is appointed to wind up its affairs. He sells the company's property, pays as much of its debts as he can do out of the proceeds of sale and then, if there is a surplus, he distributes it among the shareholders. When the liquidation is completed the company has come to an end and ceases to exist.

A limited company may be a "*private company*" or a "*public company*". A private company means a company which by its articles (a) restricts the right to transfer its shares if any; and (b) limits the number of its members to fifty not including persons who are in the service of the company and (c) prohibits any invitation to the public to subscribe for the shares if any or debentures of the company. Two or more persons holding one or more shares jointly are treated for this purpose as a single member. "A *public company*" means a company incorporated under the Indian Companies Act, which is not a private company.

### Formation of a company.

Before a company can be formed there must be some persons who have an intention to form a company, and who take the necessary steps to carry that intention into operation. Such persons are called '*promoters*'.

In the case of a public company at least seven persons and in the case of a private company at least two persons are necessary to form a company. Persons who give instructions for the preparation of the memorandum and articles of association, who obtain the directors, prepare the prospectus, negotiate underwriting contracts and contracts for the purchase of property by the company, and procure capital, are all promoters.

### Promoters.

A promoter stands in a *fiduciary position* towards the company and to those persons whom they

induce to become shareholders in it, and cannot in equity bind the company by any contract with themselves without fully and fairly disclosing to the company all material facts which the company ought to know. A company when registered is a corporation capable by its directors of binding itself by a contract with themselves if all material facts are disclosed. If a person buys property with the intention of selling it to a company to be formed, he does not acquire that property as a trustee for the company, and therefore it is quite legal for him to sell the property to the company at a profit. Moreover, he is not an agent for the company, as the company cannot have an agent before it comes into existence. A promoter who sells property to the company must either (a) see that there is an independent board of directors who can negotiate with him, or (b) make a full disclosure of the profit he is making to the intended shareholders of the company. The requirement of an independent board of directors is one which, in most cases, cannot be complied with, as the promoters, or some of them, are usually the first directors of the company. In the promotion of a private company, the promoter usually sells his business to a company, of which he is managing director, and in which he is the largest shareholder, but, nevertheless, the transaction cannot be impeached on the ground that there is no independent board of directors. In all such cases, however, there must be *full disclosure of the profit made* by the promoters either in the prospectus or, if no prospectus is issued, to the shareholders.

Although strictly speaking a promoter cannot be considered an agent or trustee for the company, the company not being in existence at the time, yet the principles of law of agency and trusteeship are applicable to his case and he is accountable for all moneys obtained by him from the funds of the company without its knowledge.

## Memorandum of Association -

The memorandum of association is the primary constitution of the company, and defines the limitation of its powers. Its purpose is to enable shareholders, creditors and those who deal with the company to know what is its permitted range of enterprise. It is the document which informs all persons dealing with the company what the company is formed to do, what capital it has to do it with, and what its nationality is. It regulates the company's external affairs, while the articles of association regulate its internal affairs.

The memorandum must contain the following

(a) *The name* The Company may choose any name, provided the following rules are complied with

(i) The name must be legibly shown on every place of business and every document issued by the company

(ii) The name must not contain, without sanction in writing from the Governor-General in Council words such as Royal, Imperial, Federal, State, etc

(iii) The name must not be identical with, or too closely resemble, the name of any other company or firm, nor may such a name be chosen as is calculated to mislead the public into confusing it with that of an existing business. In the first case the Registrar may refuse to register the company, and in the second, the person or company who is prejudiced may sue for an injunction restraining the company from using such a name.

(iv) The word 'limited' *must* be used as the last word of the name. If any officer or the company makes a contract on behalf of the company without the word "limited", he will be held liable on the contract personally and the company will not be bound by such contract.

If a company is intended to be formed, for promoting commerce, art, science, religion, charity, or any

other useful object, and applies or intends to apply its profits (if any) or other income in promoting its objects, and to *prohibit the payment of any dividend to its members*, it may obtain the licence of the Central Government to be registered as a company with limited liability without the addition of the word "Limited" to its name. The licence may be granted on such conditions as the Central Government thinks fit, and may be revoked, subject to the company's right to be heard in opposition to the revocation.

*Change in name:* If a company, which has been already registered under a name, wants to change its name, it can do so by passing a special resolution to that effect and by obtaining the sanction of the Central Government for the change. The company must send a copy of the special resolution with the sanction of the Central Government to the Registrar so that the Registrar can issue a certificate noting the change.

(b) *Registered Office:* The memorandum must mention the registered office and the province in which the office is situated so that all communications to the company may be properly addressed.

(c) *Objects.* A company is an artificial person incorporated for certain specified objects, and has no power to do any thing but those objects. It is, therefore, usual to set out at length the precise objects which the company is likely to require for carrying on its business, so as to leave as little as possible to inference.

The purpose of the statement of the company's objects is two-fold: (1) to protect the subscribers who learn from it the purposes to which their money can be applied, (2) to protect persons dealing with the company, who can infer from it the extent of the company's powers.

A contract to carry out an object not included among the objects of the company in the memorandum

is *ultra vires* - the company and void. None of the company's money can be spent except on the objects set out in the memorandum. If a director parts with the company's money or property for an *ultra vires* purpose, he will be liable to the company for the loss it has sustained, even if he acted in good faith, because the company itself cannot legally authorise him to do an *ultra vires* act. The company can, however, in such a case, validly resolve not to sue him, and there is nothing *ultra vires* in their so doing.

A company can be restrained by injunction, obtained at the suit of one of its shareholders, from doing an *ultra vires* act.

Although a company can neither enforce nor be held liable on an *ultra vires* contract, there is nothing to prevent it from protecting property by an *ultra vires* expenditure.

*Powers*—In addition to the objects strictly so called, the memorandum usually sets out a number of powers which are reasonably conducive to the furtherance of the company's objects. The following are powers frequently given: (1) power to sell the undertaking of the company for shares in another company; (2) power to take shares in another company; (3) power to borrow money and to issue bills of exchange. This is implied in the case of a trading company, but an express power removes any difficulty if there is a doubt as to whether the company answers that description; (4) power to enter into profit sharing agreements with other companies and to borrow money\* jointly with other companies. (A general power to borrow does not authorise a joint borrowing); (5) power to acquire similar businesses; (6) power to sell or otherwise dispose of any part of the property of the company.

The objects clause usually concludes by giving power "to do all such business and things as may be incidental or conducive to the attainment of the



above objects or any of them" This power must be taken with qualifications and only authorises the company to do that which is incidental or conducive to the main object of the company

A company has implied powers to do also the following acts which are not, or need not be, stated in the objects clause. (a) Any acts permitted by the Companies Act *e. g.* to alter its name or its articles, to reduce its capital etc., (ii) powers to appoint servants and agents to carry out its business, (iii) power to borrow in the case of trading companies.

*Alterations of Objects* The objects of a company can be altered by a special resolution confirmed by the court having jurisdiction under the Companies Act But they can only be altered to a limited extent in the cases set out below

(a) to carry on its business more economically or more efficiently, or

(b) to attain its main purpose by new or improved means, or

(c) to enlarge or change the local area of its operations, or

(d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or

(e) to restrict or abandon any of the objects specified in the memorandum; or

(f) to sell or dispose of the whole or any part of the undertaking of the company, or

(g) to amalgamate with any other company or body of persons

The sanction of the court is obtained by *petition* to the court Before sanctioning the alteration the court must be satisfied that sufficient notice has been given to (a) the debenture holders, and (b) every

person or class of persons whose interests will be affected by the alteration. It must also be satisfied that with respect to every creditor who is entitled to object, either his consent has been obtained to the alteration or his debt has been discharged.

The court has a discretion as to what order shall be made and may confirm the alteration in whole or in part and on such terms and conditions as it thinks fit. The court may refuse to sanction the alteration at all. In exercising its discretion it has regard to the rights and interests of (1) the members of the company, and (2) the creditors.

A copy of the order confirming the alteration, and a print of the memorandum as altered must be delivered to the Registrar of Companies within three months from the date of the order, or within such extended period as the court may allow, and if such registration is not effected within the said period, such alteration and all proceedings connected therewith shall, at the expiration of such period of three months or such further time, as the case may be, become absolutely null and void, although the court may, on sufficient cause shown, receive the order on application made within a further period of one month.

(d) *The limitation of liability* A clause stating that the liability of members is limited whether by shares or by guarantee. If the memorandum merely states that the liability of the members is limited, it means that it is limited by shares. If the liability is limited by shares, no member can be called upon to pay more than the nominal amount of his share or so much thereof as remains unpaid. Where it is fully paid up the member's liability is nil. If the liability is limited by guarantee, each shareholder undertakes to meet the debts of the company upto a specified sum, irrespective of the amount of shares he takes.

(e) *Capital issue* The memorandum must state the amount of the company's share capital and

its division into shares of fixed amount. The company cannot alter his share capital unless it is authorised by its Articles and allowed by the court to do so, that is why it is known as "*Authorised Capital*". It is also known as *Registered* or *Nominal Capital*. The whole of the authorised capital is not usually offered to the public for subscription. The portion of this capital which is actually offered to the public is known as *Issued Capital*. The portion of the issued capital which has been actually taken up by the public and allotted is called the *Subscribed Capital*. And the portion of the subscribed capital which is actually paid up by those who have taken them is known as the *Paid-up Capital*. The portion of the subscribed capital which remains unpaid is known as the *uncalled capital* which the shareholders can be called upon to pay whenever occasion arises. When a company by a special resolution declares that this uncalled capital shall not be capable of being called up except in the event of and for the purpose of the company being wound up, this uncalled capital becomes the *Reserve Capital* of the company. It cannot be called in except on winding up.

The shares may be divided into classes, e.g. preference, ordinary and deferred shares, but it is usual to do this in the articles rather than in the memorandum. If the share is divided into classes in the memorandum and no provision is inserted for altering them, no alteration can subsequently be made without the consent of the court.

*Preference shares* A preference share is one which is entitled to a preference as to be divided at a fixed rate over an ordinary share, and in some cases to a preference as to capital in a winding up. There may be several classes of preference shares, first, second and third, ranking one after the other. The preference which attaches to a preference share depends in each case on the articles or the terms of issue, and reference must be made to the articles or the terms of issue

to understand the right connected with any particular preference share

When a right to a preferential dividend is given without more, it is a right to a *cumulative* dividend, *i.e.*, if no dividend is declared in any year the arrears of dividend are to be carried forward and paid before a dividend is paid on the ordinary shares. If, however, the shares are declared to be non-cumulative preference shares, or the preferential dividend is to be paid out of the yearly profits, or out of the net profits of each year, the dividend will not be cumulative.

Companies are given power, if so authorised by their articles, to issue preference shares which are or at the option of the company are liable to be, *redeemed*. Shares so issued can only be redeemed—(a) if they are fully paid, (b) out of profits available for dividend; or (c) out of a fresh issue of shares made for the purpose of redeeming them.

When such shares are redeemed out of profits there must be transferred, out of profits which would otherwise have been available for dividend, to a "capital redemption reserve fund" a sum equal to the amount applied in redeeming the shares. This fund can only be reduced as if were paid up capital of the company.

Preference shares already issued cannot be converted into redeemable preference shares, because this is not an "issue".

(11) *Ordinary shares* The holders of this class are entitled to dividend out of net profits after the payment of dividend on the preference shares.

(111) *Deferred shares*: Some companies issue deferred or founder's shares. These shares are usually of small nominal value with right to take the whole or a proportion of the profit after a fixed dividend has been paid on the ordinary shares. The rights of the holders of deferred shares depend on the articles or terms of issue.

*Stock:* When shares are fully paid up they may be turned into stock. When the capital of a company is consolidated into stock, it is no longer divided into equal parts or shares but it may be divided into any amount. The chief points of difference between stocks and shares are: (a) shares may be fully or partly paid up. But stocks must be fully paid up, (b) shares can be issued and transferred only in terms of complete and indivisible units of the capital. And a share cannot be bought and sold in fractions. But stocks may be issued and transferred in terms of any amounts, (c) shares are distinctly numbered. But stocks bear no such numbers.

Consolidation is effected in general meeting according to the articles. Notice must be given to the registrar within fifteen days, of the consolidation, conversion or re-conversion, and in case of default the company is liable to a fine not exceeding fifty rupees for every day during which the default continues and every officer of the company who knowingly and wilfully authorises or permits the default is also liable to the like penalty.

*Alteration of capital* A company, if so authorised by its articles, may alter its capital in the following ways: (1) by increasing the Authorised Capital of the company, (2) by diminishing the Authorised Capital of the company; (3) by consolidating existing shares (4) by subdividing existing shares, (5) by re-organising existing classes of shares.

Every company, if authorised by its articles, subject however to any conditions in the articles, may increase its *nominal* or *authorised* capital by a resolution of the company in a general meeting. If, however, the articles of the company do not authorise such an increase, the company may alter its articles by a special resolution to enable itself to do so. The new capital may be divided into preference, ordinary or deferred shares, provided it is not contrary to the

memorandum If it is, the memorandum may be altered by sanction of the court.

A company may reduce its share capital by a special resolution, provided it is authorised by the articles, subject to confirmation by the court. Reduction is mainly effected in the following three ways, (i) Return of paid-up capital to the shareholders on the ground that it is not required for the company's purposes, (ii) reduction or extinction of the liability outstanding on shares on similar grounds; (iii) writing down of the paid-up capital on the ground that assets have been lost and that the capital is not now fully represented by assets

If the existing creditors of the company are not affected by a reduction of capital, *e g* if it is case (iii) above and not case (i) or (ii), the court will sanction the reduction and confirm the special resolution. But if the reduction does affect the rights of the creditors, *e g* where reduction is effected as in (i) or (ii) above, creditors settled by the court must be given notice of such reduction. If any creditor objects to such reduction, his debt must either be satisfied or secured. When the court is satisfied that all the creditors have either consented to such reduction or their claims have been satisfied or secured, the court will sanction the reduction and confirm the special resolution.

(f) *The Association Clause* This is the clause by which the subscribers to the memorandum declare that they desire to be formed into a company and agree to take the shares opposite their respective names. It is usual for each subscriber to sign the memorandum for one share only. There must be at least seven subscribers in the case of a public company and two in the case of private company. The agreement to take shares contained in this clause is absolute and binding even though the company never commences its business, and it cannot be set aside on the ground of misrepresentation.

## Articles of Association.

The articles of association is a document regulating the rights of the members of the company among themselves, and the manner in which the business of the company shall be conducted. It deals with the issue of shares, transfer of shares, alteration of the capital, borrowing powers, general meetings, voting rights, directors, their appointment and powers, dividends, accounts, audit of accounts, winding up and various other matters which will be referred to hereafter

*Registration of Articles.* Unlimited liability companies and companies limited by guarantee *must* register their articles, Limited liability companies *may* register their articles. If they do not register, a set of Articles contained in Table A of the First Schedule of the Indian Companies Act will be deemed to apply to them. Certain regulations contained in Table A are applicable to all companies *e.g.*, the method of deciding questions at general meetings, depositing proxy forms, business to be managed by directors and so on

*Alteration of Articles.* A company can alter or add to its articles by passing a special resolution. An alteration or addition so made is as valid and can be altered in the same way as if originally in the articles

The articles must be altered in good faith and, not so as to give an unfair advantage to a majority of the shareholders

**Registration of a Company** The memorandum and the Articles (if any) must be signed by at least seven persons in the case of a public company and two persons in the case of a private company, each of whom must subscribe at least one share of the company. Then they have to be filed with the Registrar of Joint-Stock Companies along with the following particulars:

(a) A list of persons who have agreed to act as directors.

(b) The written consent of those whose names have been given as directors as per above, that they have so agreed

(c) A statement as to the address of the Registered office

(d) A contract of directors to take qualification shares, i.e. the minimum number of shares, which according to the articles a director must take, where they have not subscribed to the memorandum

(e) A declaration from an advocate attorney or pleader that the provisions of the Indian Companies Act have been complied with

The Registrar, after he is satisfied that all the requirements have been complied with and the prescribed fees have been paid, enters the name of the company in the register and issues a certificate of incorporation. The company comes into existence as a legal person from the moment the certificate of incorporation is issued.

### Fees on registration :

#### I *By a company having a share capital*

1. For registration of a company whose nominal capital does not exceed Rs 20,000, a fee of Rs 40
2. For registration of a company whose nominal share capital exceeds Rs 20,000, the above fee of forty rupees, with the following additional fees regulated according to the amount of nominal capital (that is to say) —  
 For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 20,000 rupees up to 50,000 rupees Rs 20  
 For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 50,000 rupees up to 1,00,000 rupees Rs. 5  
 For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 1,00,000 rupees, Rs. 1
3. For registration of any increase of share capital made after the first registration of the company, the same fees per 10,000 rupees or part of 10,000 rupees, as would have been payable if such increased share capital had



formed part of the original share capital at the time of registration.

Provided that no company shall be liable to pay in respect of nominal share capital on registration, or afterwards, any greater amount of fees than 1,000 rupees taking into account, in the case of fees payable on an increase of share capital after registration, the fees paid on registration

- 4 For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act. the same fee as is charged for registering a new company.
- 5 For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up ..Rs 3
6. For making a record of any fact by this Act authorised or required to be recorded by the registrar, a fee of Rs 3

## II *By a company not having a share capital.*

- 1 For registration of a company whose number of members as stated in the articles of association, does not exceed 20, .. Rs. 40
2. For registration of company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100 .. Rs. 100
3. For registration of a company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of Rs 100 with an additional Rs 5 for every 5 members, or less number than 50 members, after the first 100
4. For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of Rs. 400
5. For registration of any increase on the number of members made after the registration of the company the same fees as would have been payable, in respect of such increase if such increase had been stated in the articles of association at the time of registration :  
Provided that no one company shall be liable to pay on the whole a greater fee than Rs. 400 in respect of its number of members, taking into account the fee paid on the first registration of the company.

6. For registration of any existing company except such companies as are by this Act exempted from payment of fees in respect of registration under this Act the same fee as is charged for registering a new company
7. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up Rs 3
8. For making a record of any fact by this Act authorised for required to be recorded by the registrar, a fee of Rs 3

This is subject to the *proviso* that the aggregate of the fees payable in respect of the matters specified in the items 5 and 6 of Part I and items 7 and 8 of Part II above, shall not exceed rupees three in case in which both fees are payable in respect of a single document or transaction

*Exemption* No fees shall be charged in respect of the registration in pursuance of Part VIII of the Indian Companies Act of a company if it is not registered as a limited company, or if before its registration as a limited company the liability of the shareholders was limited by some Act of Parliament or Act of the Central Government or by Letters Patent

*Effect of registration* From the date of incorporation the members of the company form a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company and having perpetual succession and common seal. A company on becoming registered is a legal person separate and distinct from its shareholders. The property of the company belongs to the company itself and not to the individual shareholders. Accordingly the managing director even if he owns all the shares except one, cannot lawfully put cheques payable to the company into his own banking account, or draw cheques for his own purposes upon the company's banking account. It also means that the company's debts are the obligations of the company

alone and cannot be enforced against individual shareholders, however many shares they may own.

*This principle of the independent corporate existence of the company is of the greatest importance in company law.* It is this which distinguishes it from a partnership, which has no separate legal existence, but is merely the association of two or more persons carrying on business together. In a partnership, the property of the firm belongs to the partners and the firm's debts are the debts of each of the partners, but in a company both its assets and liabilities are the assets and liabilities of the company and not of the shareholders.

### Prospectus

A private company can commence its business immediately after it is incorporated. But a public company has to issue a prospectus inviting the public to subscribe to shares in order to raise the minimum subscription without which it cannot commence business. The Indian Companies Act defines a prospectus as "any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of a company, but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed." In order to be an offer to the public it must be an offer to any person who chooses to come in and take the share. And, therefore, a private offer to friends does not make the document a prospectus. The prospectus is usually issued immediately after the incorporation of the company. It must be dated and signed by all persons named as directors or their authorised agents.

A copy of the prospectus must be filed with the Registrar before it can be issued in order to prevent the public from being misled or defrauded by the optimistic picture generally portrayed by a prospectus. It is required under the law that every prospectus must contain the following facts: (1) The contents of

the memorandum with names, descriptions and addresses of signatories, and the number of shares' subscribed for by them (2) The number of founders shares if any, and the nature and extent of the interest of the holders in the property and the profits of the company (3) The number of redeemable preference shares intended to be issued together with the date and proposed method of redemption. (4) The number of shares (if any) fixed by the articles as the qualification of a director and any provision in the articles as to the remuneration of the directors. (5) The names, description and addresses of the directors, manager, and managing agents together with their remuneration and terms of appointment (6) The minimum subscription acquired for allotment and the amount of share money payable on application and allotment (7) The number and amount of shares and debentures issued within the two preceding years (8) If any part of the issue is underwritten, the names of the underwriters (9) Names and addresses of vendors of any property purchased or acquired by the company (10) If the property was purchased within two years of the issue of the prospectus the history of all previous transfers of the property and if the property purchased is a business, the profits and the balance sheet (11) A statement about the preliminary expenses (12) The amount paid to any promoter within the two preceding years and the consideration for any such payment. (13) The names and addresses of the auditors (if any) of the Company (14) The dates of and parties to every material contract (15) Particulars regarding the nature and extent of the interests of the directors in the promotion of the Company or in the property proposed to be acquired by the Company (16) The rights of voting and the rights as to capital and dividend attached to each class of shares (17) If the articles impose any restrictions on the rights of members to attend, speak or vote in meetings or to transfer their shares, a statement about such restrictions (18)

If the Company issuing prospectus has carried on business before a report of the auditor regarding profits and dividend for three preceding financial years, and a report if the proceeds of the issue of shares are to be applied in the purchase of any business.

### **Statement in lieu of prospectus**

A public Company cannot allot shares unless it files with the Registrar either a prospectus or a statement in lieu of a prospectus. A company may choose either to issue a prospectus or statement in lieu of prospectus. A statement in lieu of prospectus must be signed by every person named or proposed as director or by his agent authorised in writing. It must be in a prescribed form and contain almost all the particulars set out above.

*Underwriting:* Underwriting is a contract whereby certain people known as underwriters agree to take up a number of shares of the company if the issue is not fully subscribed in consideration of the payment of a certain commission. Commission for underwriting must be allowed by the articles and as we have seen before, the prospectus must disclose the rate of the underwriters' commission.

### **Membership of a company.**

The shareholders are the members of a company. The members consist of.—

1. The subscribers of the memorandum. These are deemed to have become members, and the company must, on registration, enter them in its register of members.

2. Directors who have signed and delivered to the Registrar an undertaking to take and pay for their qualification shares. Such directors are in the same position as if they had signed the memorandum for the shares.

- 3 Persons who have agreed to become members

of the company, and whose names are entered in the register of members

### **Allotment of shares.**

After the issue of the prospectus, the company sends application forms, each attached with a copy of the prospectus, to intending subscribers. In due course these application forms reach the company duly filled in and signed by those who intend to become shareholders. Then the company proceeds to allotment which means the distribution of shares among the applicants. An application is only an offer to the company, and the company has therefore the right to refuse allotment in any particular case. The applicant whose offer is rejected gets in due course a *letter of regret*. Those to whom shares are allotted are intimated of such allotment by *letters of allotment*. No allotment can, however, be made unless the *minimum subscription* has been subscribed and the amount due on application, which must not be less than 5% of the nominal value of the shares, has been paid in cash or by cheque which the directors have no reason to suspect.

*Minimum subscription* is the minimum amount which, in the opinion of the directors, must be raised by the issue to provide for (a) the purchase price of any property purchased or to be acquired, (b) preliminary expenses, (c) underwriting commissions, (d) repayment of money borrowed for these purposes; (e) working capital.

*Minors*: In England an infant's agreement to take shares is voidable at his election on his attaining majority. But if the shares are registered in his name, and after attaining majority he acts as shareholder, or does not within a reasonable time repudiate the shares, he cannot afterwards do so. Under the Indian Contract Act an infant's contract is however altogether void. But a transfer in favour of a minor is not void, although a contract to take share on

behalf of a minor cannot be specifically enforced either for or against him. So it appears that a minor may become a shareholder if shares are transferred to him, but the company may refuse to accept him as a shareholder.

*Cessation of membership* Membership is terminated in any of the following manners :

(1) Transfer by a shareholder of his share, (2) Forfeiture of share for non-payment of calls or otherwise, (3) Surrender of share, (4) Death of a shareholder; (5) By the rectification of the share register and the expunging of the name of a person who has been induced to take shares by fraud and misrepresentation.

### **Commencement of business.**

A Public Company is not authorised to commence business even after the shares have been allotted. In order to be able to commence business, the company must file with the Registrar a duly verified declaration of the secretary or one of the directors in a prescribed form to the effect that shares to an amount not less than the minimum subscription have been allotted and that every director has taken and paid the amount due on application and allotment of his share. On this, the Registrar grants a *'certificate for commencement'* which entitles the company to commence business forthwith.

### **Rescission of contract for subscribing for shares.**

A contract to take shares is governed by the same rules as other contracts. A company is, therefore, liable for any untrue statement in the prospectus. Thus, if a person who subscribes for shares proves (i) that there is an untrue statement in the prospectus, and (ii) that he was induced to take the shares in reliance upon it, then he is entitled to set aside the contract on the ground of *misrepresentation*. If he can prove that the mis-statement was deliberately made or made recklessly, he will be entitled not only

to avoid the contract but also to damages from the company on the ground of fraud

In order, however, to obtain rescission of the contract he must bring his action as soon as he learns the untruth of the statement, failing which he may be estopped from having it rescinded

### **Special liability of Directors and Promoters**

Apart from liability under the general law of contract, a special liability attaches to all persons who were directors of the company when the prospectus was issued, persons who had authorised the use of their names as directors in the prospectus or as having agreed to become directors, promoters, and all those who had authorised the issue of the prospectus. All such persons become liable to pay compensation to any one who subscribes for shares on the faith of a prospectus for damage sustained by reason of any untrue statement in it, *unless* any one can prove one of the following

(a) that he believed the untrue statement to be true from the time of the issue of the prospectus down to the allotment of shares and that he had reasonable grounds for that belief, or

(b) in case of a director, that he withdrew his consent to become a director before the prospectus was issued and that in fact it was issued without his knowledge or consent, or

(c) that the prospectus was issued without his knowledge or consent, and that as soon as he became aware of it, he gave public notice of that fact that he had not consented, or

(d) that although he consented to the issue of the prospectus he withdrew his consent to it before shares were allotted and gave reasonable public notice of that fact and with reason for it, or

(e) that he made the statement upon the authority of an expert whom he had reasonable grounds



for believing to be competent; or

(f) that the statement was a correct copy of an official document

### Shares

A share is the interest of a shareholder in the company measured by a sum of money for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders on the terms of the articles. The share is measured by a sum of money, namely, the nominal amount of the share, and also by the rights and obligations belonging to it as defined by the Companies Act and by the memorandum and articles of the company.

*Transfer of shares.* The shares or other interests of any member in a company are moveable property, transferable in manner provided by the articles of the company. Thus, every shareholder has a right to transfer his shares, unless the articles provide to the contrary. Sometimes the articles empower the directors to refuse to register transfer in certain events. The following cases frequently occur

(i) An article providing that on the bankruptcy of a member he shall sell his shares to particular persons at a particular price, which is fixed for all persons alike and is not shown to be an unfair price, is valid

(ii) Private Companies frequently have articles to the effect that no shares shall be transferred except to a member of the company, so long as a member can be found to purchase them at a fair value to be determined in accordance with the articles. Such provisions do not entitle the company to refuse to register a transfer of shares from one member to another member of the company.

(iii) Sometimes the articles provide that before selling his shares a member must inform the directors of the number of shares to be sold, their price and the

name of the proposed transferor, and before the transfer can take place the shares must be offered to the existing members who have the right to buy at that price. In such a case, any member to whom the shares are offered must buy them all and not merely a part, otherwise the proposed transfer can be carried out.

(iv) When directors have power to decline to register a transfer, either absolutely or on certain specified grounds, and they refuse registration without giving any reasons, their refusal cannot be questioned unless there is evidence that they have not acted in good faith. Articles giving the directors an absolute and uncontrolled discretion to refuse to register a transfer empower them to refuse registration without giving reasons. The duty of directors in such a case is to act in good faith in the interest of the company and with due regard to the shareholder's right to transfer his shares, and fairly to consider the question at a board meeting. If the directors give reasons for their refusal, the court can decide whether they are sufficient to justify their refusal.

(v) If directors have power to decline registration and are equally divided, their power is not exercised, and the transfer must be registered.

A company may always decline to register a transfer which is not properly stamped. As to *stamp duty* see chapter *infra*.

*Transfer how effected* The transfer must be in writing and the company must not register a transfer unless a proper instrument in writing has been delivered. A transfer need not be by deed, unless the articles expressly require a deed.

The usual form of transfer is as follows,

I, A B ... , in consideration of the sum of Rs ..... paid to me by, C D of . (hereinafter called the said transferee) do hereby transfer to the said transferee the share (or shares) No .. ... in the undertaking of the Company Ltd

to hold unto the said transferee, his executors, administrators and assigns, subject to the several conditions on which I held the same at the time of the execution thereof, and I, the said transferee, do hereby agree to take the said share (or shares) subject to the conditions aforesaid. As witness hereof our hands the . . . day of . . .

Witness to the signatures of etc.

The instrument of transfer is executed by the transferor and handed to the transferee with the share certificate. The transferee executes it, and sends it to the company for registration. Until registration, the transfer is not complete.

*Rights as between vendor and purchaser* : Where a person, who is on the register of shareholders, purports to transfer his share, what he transfers includes the right to get on the register and to become a member in his stead. Upon a transfer all the rights and obligations of the member in respect of the shares are transferred *from the date of the transfer*, but his right to dividends etc. already declared are not transferred unless expressly so provided, nor are the liabilities in respect of calls already made; but the rights to future dividends, and liabilities in respect of future calls are transferred. *If the transfer is preceded by a contract* the purchaser will be entitled to dividends declared after the contract. Ordinarily, and in the absence of a contract to the contrary, a purchaser of shares is entitled to all the dividends which may have been declared after the date of the purchase. The general rule however may be modified by special stipulations.

*Forged transfer*. A forged transfer is a nullity and cannot affect the title of the shareholder whose signature is forged. If the company, therefore, has registered the forged transfer and removed the true owner from the register, it can be compelled to replace him. It can then claim an indemnity from the person who sent the forged transfer for registration.

" . . . To protect themselves against the consequences of forged transfers, companies usually, on a transfer being lodged for registration, write to the transferor informing him of the transfer and of their intention

to register it unless by return of post they hear to the contrary. The neglect of the shareholder to reply to this communication does not estop him from proving that the transfer is a forgery

*Transfer in blank.* In the case of a share certificate with a blank transfer duly signed by the registered holder, the right principle is that each prior holder confers on the *bona fide* holders for value of the certificates for the time being an authority to fill in the name of the transferee and is estopped from denying such authority, and to this extent, but no further, is estopped from denying the title of such holder for the time being. By delivery an inchoate legal title passes, but a title by unregistered transfer is not equivalent to the legal estate in the shares or to the complete dominion over them. The certificate with blank transfer contemplates transfer by getting in the name of the transferee and by registration on the books of the company

If the owner of the certificate leaves it and an executed transfer with his broker who wrongfully pledges it with a bank, the title of the bank which had no notice of the fraud will prevail. But where the plaintiff wishing to sell certain shares was induced by his broker to execute a transfer in blank and the broker afterwards filled in the number etc of the shares of another company of which the plaintiff was the owner, and the broker also stole the share certificates from the plaintiff's box and passed the transfer as a genuine transfer, and the name of the purchaser was registered, it was held that the plaintiff was not guilty of culpable negligence such as estopped him from asserting that the transfer deed was a forgery and from claiming damages and a mandamus to have his name restored to the register

### Security on shares

A security may be given on shares by a *legal mortgage* in which case a transfer to the mortgagee is executed and registered with the company, or by an

*equitable mortgage* by deposit of the share certificate with or without a transfer in full or in blank executed by the mortgagor. But the equitable mortgagee's position is not always safe as the mortgagor may obtain a fresh certificate and frustrate the claim of the mortgagee. The position of an equitable mortgagee of shares is not however prejudiced by the mortgagor's bankruptcy, although the shares remain registered in his name and notice of the mortgage has not been given to the company.

A mortgagee of shares must give notice of his incumbrance to the company, or his lien will be lost as against a subsequent purchaser for value without notice. Where a principal entrusts an agent with securities and instructs him to raise a certain sum upon them, and the agent borrows a larger sum, the lender being ignorant of the limitation, the principal cannot redeem the securities without paying the lender all he has lent, although the agent has obtained the loan by fraud and forgery and although the lender made no inquiry. Where shares are pledged with a company, the legal owner thereof is the shareholder and not the company. He alone must be held liable for all unpaid calls thereon.

*Priority of title* : As between two persons claiming title to shares registered in the name of a third person, priority of title prevails unless the claimant, second in point of time, can show that as between himself and the company, before the company received notice of the claim of the first claimant, the second claimant has acquired the full status of a shareholder, or at any rate that all the formalities have been complied with, and that nothing more than some ministerial acts remain to be done which the company cannot refuse to do forthwith.

If more of the transfers are registered, the first in point of time has priority, and this priority is not lost because some ministerial act has not been done.

The onus is on the transferee, later in point of time, to show that he acquired the full status of shareholder earlier

*Surrender of share* : It is not open to a shareholder to surrender his shares, or to the company to accept the surrender, unless the act of the company can be brought within the rules relating to forfeiture of shares. A surrender of shares, the company releasing the shareholder from further liability in respect of the shares, is equivalent to a purchase of the shares by the company and is therefore illegal and void. The articles of a company often allow directors to accept surrender of shares. There is no reason to suppose why a surrender of a fully paid up share accepted by the company *bona fide* and for the interest of the company should not be valid.

*Share certificate* Share certificates are movable property, and also "goods" within the meaning of the Indian Sale of Goods Act. Where the denoting number of the shares are not ascertained at the time of the contract, but share certificates are handed with transfer executed by the transferor (even in blank) and accepted by the purchaser, the shares become ascertained goods and the sale is complete. Title to get on the register consists in the possession of a certificate together with a transfer signed by the registered holder. Provisions in the articles authorizing the holders of scrips to pass shares to delivery are irregular and such a company may be ordered to be wound up. If a shareholder disposes of his shares by invalid transfer, he remains liable in respect of those shares.

*Transmission of shares* Transmission of shares differs from transfer in that it signifies passing of shares from one person to another by the operation of law, such as by death or insolvency. On the death of a shareholder his share vests in his personal representatives and his estate remains liable for calls. On the insolvency of a shareholder, the official Assignee

or the Receiver can sell and transfer his shares.

### **Rights of Members.**

A member or a shareholder of a public company has the following rights:

(1) He has a right to transfer his share subject only to the restrictions imposed by the articles

(2) He has the right to inspect the register of members kept open in the registered office of the company, gratis.

(3) He can require a copy of the register or of any part thereof, or the list and summary required by the Companies Act or part thereof, on payment of /6/ for every hundred words or fractional part thereof required to be copied

(4) He can demand inspection of the minute books of general meetings of the company, register of directors, managers and managing agents, register of contracts in which any director or directors are directly or indirectly concerned, or interested, and also copies of mortgages or charges requiring registration under Section 109 of the Companies Act at all reasonable times.

(5) He is entitled to have a copy of the statutory report at least 21 days before the statutory meeting, a copy of the balance sheet, profit and loss account, auditor's report and the directors' report at least 14 days before the date of the annual general meeting and also of notice of meetings of the company at least 14 days before such meetings.

(6) He is entitled to receive a copy of the memorandum and articles within 14 days at his request and on payment of Re. 1/- or such less sum as the company may prescribe.

(7) He is entitled to be furnished with a copy of the minutes of general meetings within 7 days after he has made a request in that behalf at a charge not

exceeding -/6/- for hundred words,

(8) He can require a copy of the register of holders of debentures or any part thereof, and also copies of mortgages and charges and the company's register of mortgages on payment of -/6/- for every one hundred words required to be copied.

(9) He is entitled to be furnished with copies of the Balance Sheets and the Profit and Loss accounts or the income and expenditure account and the auditor's report at a charge not exceeding -/6/- for every hundred words

(10) He has a right to apply to the Court for rectification of the share register if (a) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a company, or (b) unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member

(11) He can apply to the Court to call or direct the calling of a general meeting of the company if default is made in holding a meeting in accordance with the provisions of the Companies Act

(12) He can apply for compulsory winding up of the company on the ground of default in filing the statutory report

The members in a body are collectively endowed with certain rights. Under the Indian Companies Act they can collectively do any one of the following acts by ordinary resolution and by a simple majority of votes.

1. Increase the share capital by the issue of new shares if the articles authorise the same

2. Consolidate and divide all or any of its share capital into shares of larger amounts or sub-divide the shares into smaller amounts.

3. Convert shares into stock or stock into share

4. Cancel the shares which have not been



taken or agreed to be taken by any person.

5. Discuss and pass any resolution relating to the statutory report in the statutory meeting.

6. Appoint the Directors.

7. Declare dividend, but no dividends declared shall exceed the amount recommended by the directors.

8. Consent to the Directors' selling or disposing of the undertaking of the Company or remitting any debt due by a director.

9. Appoint auditors.

10. Pass a resolution for winding up of the company when the period, if any, fixed for the duration of the company by the articles expires

The members or shareholders can by special resolution do the following,

1. Alter the articles.

2. Alter the memorandum, subject, of course, to the sanction of the court.

3. Reorganise the share capital either by reducing or increasing the same.

4. Appoint inspectors for investigating the affairs of the company.

5. Wind up the company.

The members or shareholders can, by extraordinary resolution, do the following :—

1. Declare that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

2. Remove any director, whose period of office is liable to determination at any time by retirement of directors in rotation, before the expiration of his period of office and may appoint another person in his stead.

### **Duties and liabilities of members.**

The duties and liabilities of members are partly contractual and partly statutory. The statutory liabi-

lities are those which the Company Act imposes by virtue of the shareholders becoming shareholders. Thus each shareholder is under a statutory liability to pay the uncalled portion of the money due on shares. Contractual liability is imposed by the articles which every shareholder is deemed to have adopted.

(1) *Calls* When shares are issued, the full amount of the share is not usually payable at once. Part is payable on application, part on allotment, and the remainder by instalments at fixed dates. These instalments are not calls, as the obligation of the shareholder to pay is not dependent on a call from the company. A call is the result of an obligation on the part of the shareholder to pay the whole or part of the balance unpaid on the shares "as and when called on".

Calls are made in the manner laid down in the articles. A call is not properly made unless both the amount of the call and the date of payment is fixed. A verbal direction to the secretary fixing the date of payment is not enough. The call is usually made by the directors by a resolution at a Board meeting and the Secretary gives notice of the call to all the shareholders.

If authorised by the articles a company may accept payment from a member of the whole or a part of the amount remaining unpaid on his shares although no part of this amount has been called up.

(2) *Forfeiture*: A company has no power to forfeit the shares of its members, unless it is expressly authorised by the articles to do so. Forfeiture, being in the nature of a penal proceeding is only valid if the provisions of the articles are strictly followed. Any irregularity will avoid the forfeiture. The power of forfeiture must be used for the benefit of the company and in good faith, and not for the purpose of relieving shareholders from their liability.

The effect of the forfeiture on the former

owner of the shares is to discharge him from his liability on the shares. "The company on forfeiture gets its shares back, and the shareholder who has had his shares forfeited is wholly discharged from his liability". To prevent this position from arising, the articles usually preserve the liability of the former owner. These usually provide: "A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company receive payment in full of the nominal amount of the shares"

(3) *Lien*. The articles of a company generally provide that the company shall have a first lien on the shares of the member for their debts and liabilities to the company. The result is that the company can claim a charge over shares of a member indebted to the company in preference to the other creditors of the shareholder. But it should be noted that, if the shareholder mortgages his share and the mortgagee gives notice to the company and the shareholder becomes indebted to the company prior to the mortgage, the lien of the company will prevail over the mortgage.

*Dividends*: A dividend is the share of that portion of the company's assets divided among the members which is received by a shareholder. No express power to pay dividends is required in the Memorandum or the Articles, but the articles set out the way in which dividends are to be declared and the fund from which they are payable. Dividends must be carefully distinguished from interest. Interest is a debt which, like all debts, is payable out of the company's assets generally. A dividend, however, is only a debt after it has been declared by the company, and dividends cannot be declared out of the assets generally; they can only be declared out of the assets legally available for dividend.

No shareholder, not even a preference shareholder, has a right to sue for enforcing payment until a dividend is declared.

A company is not bound to divide the whole of its profits amongst the shareholders unless its memorandum or articles clearly provide that it shall do so. The dividends must be paid in cash and cannot be paid otherwise such as by the issue of debentures bearing interest.

*Interim dividend* The articles of a company usually provide that the directors may pay interim dividends. An interim dividend is a dividend declared at any time between two ordinary meetings

### **Directors.**

One of the advantages of the company system is that it enables a person to have financial interest in a business in the management of which he is unable to take part. The management of a company is therefore usually entrusted to a small body of persons commonly called "directors," but who are sometimes called governors, managers, or committee of management.

Every company, other than a private company must have at least three directors. The first directors are often named in the articles. But if the articles do not provide for such appointment, the subscribers of the memorandum shall be deemed to be the directors of the company until the first directors shall have been appointed. Subsequent directors are appointed by the shareholders in general meeting. Where a director retires or dies before his term of office has expired, the other directors may fill up the vacancy by making an appointment themselves. Usually the method of appointing directors is laid down by the articles and the above rules are subject to the articles. Directors appointed must retire by rotation and at least two thirds of the number of directors must retire at one time.

No person can, however, be appointed as a director by the articles or named or proposed as a director in a

prospectus unless before the registration of the articles or the publication of the prospectus he or his agent has-(1) signed and filed with the Registrar a consent in writing to act as such director, (ii) either signed the memorandum for a number of shares not less than his qualification shares or taken from the company and paid for or agreed to pay for his qualification shares, or signed and filed with the Registrar a contract in writing to take from the company and pay for his qualification shares, or made and filed with the Registrar an affidavit to the effect that a number of shares, not less than his qualification shares, are registered in his name.

The minimum number of shares which every director must subscribe in order to become a director is known as the "*qualification shares*" and a director must obtain it within two months of his appointment.

*Vacation of office by Director:* A director must vacate his office if (1) he fails to obtain qualification shares within two months of his appointment; (2) he is found by court to be of unsound mind; (3) he is adjudged an insolvent, (4) he fails to pay calls on his shares within six months of such call; (5) he or any firm of which he is a partner or any private company of which he is a director, without the sanction of the company in general meeting, accepts any position of profit under the company other than that of a managing director, manager, or a legal or technical adviser, or banker, or accepts loans or enters into contracts with the company; (6) he absents himself from three consecutive meetings of the board of directors, or for three months, whichever is longer, without leave from the board of directors; (7) he is committed of any criminal offence against the company.

*Remuneration of Directors:* Directors cannot claim any remuneration for their work unless the articles provide for it or the shareholders authorise it by resolution in general meeting. The remuneration

of directors is a debt owing by company and as such can be paid out of capital

*Position of Directors* The exact position of directors with regard to the company is rather hard to define. They are not servants of the company, but are rather in the position of managers or "managing partners" In some respects they may be said to be (1) trustees, and (2) agents on behalf of the company

Directors are trustees of the company's money and property in the sense that they must account for all the company's money and property over which they exercise control, and must refund to the company any of its money or property which they have improperly paid away. Directors are trustees of the powers entrusted to them in the sense that they must exercise their powers honestly and in the interests of the company and the shareholders and not in their own interests Strictly speaking, however, the directors of a company are not trustees, because they are not persons in whom the property of the company may be said to be vested. Thus, directors cannot make a profit out of property in regard to which their fiduciary relationship exists.

When directors contract on behalf of a company their position is the same as that of other *agents* and they incur no personal liability on the contract. If, however, directors exceed the powers given to them by the memorandum and articles they will be liable for breach of warranty of authority Their actions may be ratified by the company if they act within the powers in the memorandum but outside the powers conferred on them by the articles

*Powers and duties of Directors* The powers of directors are generally contained in the articles, and subject to the articles, the directors can do all that is necessary for the proper conduct of the business of the company The powers of the directors must be exercised as a body by the board of directors, unless

the articles allow the directors to delegate their powers to some one else or one of them. Generally the articles provide for the giving of special powers to one or more directors known as *managing directors* who actually conduct the business of the company from day to day. The following *restrictions* have, however, been laid down by the Companies Act on the powers of directors

(1) The directors of a public company cannot, except with the consent of the company in general meeting, sell or dispose of the undertaking of the company or remit any debt by a director.

(2) The directors cannot make or grant any loan to any of the directors

(3) A director cannot hold any office of profit under the company except that of a managing director, manager, technical advisor or banker without the consent of the company obtained in general meeting

(4) A director cannot enter into any contract for the sale, purchase or supply of goods and materials with the company without the consent of the other directors

(5) A director interested in a contract must give notice to other directors about his interest and he cannot attend and vote in the meeting of the board of directors where such contract is to be discussed and considered.

*Liability of Directors* The liability of the directors is as follows

(1) Directors are bound to carry out their duties with such care as is reasonably to be expected from persons of their knowledge and experience. If they fail to exercise that care they are guilty of negligence and liable accordingly. They are liable to the company for wrongful application of the company's money, this liability being either in the nature of a

breach of trust, by which the director benefits, *e.g.*, accepting a present of qualification shares from a promoter, or due to negligence in dealing with the company's property in some manner not recognised by the articles or the memorandum or the Companies Act, *e.g.* paying dividends to shareholders when no profits have been made. But in cases where directors derive no personal benefit, they are excused if they act honestly and reasonably

(2) They are specially liable to repay to shareholders any application moneys or other moneys paid in respect of an allotment of shares which is irregular *e.g.*, where allotment had taken place before the minimum subscription was forthcoming. The directors are, however, excused if they can prove that the default was not due to any misconduct or negligence on their part

(3) The directors are also liable to persons who apply for shares on the faith of mis-statements in the prospectus

(4) The directors may also become liable on the winding up of the company if it is shown that they were knowingly parties to the carrying on of any business of the company for any fraudulent purpose to and, in particular, for the purpose of defrauding creditors

*Exemption from liability.* The liability of directors is exempted under the following conditions (i) in cases of negligence, default etc., if the directors have acted honestly and reasonably, (ii) in cases of errors of judgment, (iii) in cases of frauds committed by subordinate officers of the company without the knowledge of the directors

No director, however, can escape liability for his own neglect, default, breach of duty or breach of trust for which he is made liable by ordinary law, irrespective of any agreement or any provision in the articles freeing him of such liability



Directors are not liable for fraud or misconduct (*e.g.* issuing fraudulent prospectus) of their *co-directors* or other persons employed by the company, unless they have expressly or tacitly permitted its commission.

### **“Managing Agents” and “Manager”**

“Managing Agent” means a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement and includes any person, firm or company occupying such position by whatever name called. A “*manager*” means a person who subject to the control and direction of the directors has the management of the whole affairs of a company and includes a director or any other person occupying the position of a manager by whatever name called and whether under a contract of service or not.

#### *Appointment and removal of Managing Agents :*

All appointments and removals of managing agents and variation of their contracts must be approved by the company at a general meeting. But this provision will not apply where such appointments are made before the issue of the prospectus and where the prospectus contains the terms of appointment. A company may always remove a managing agent by a resolution passed at a general meeting notice of which has been given to the managing agent, where such managing agent is convicted of a criminal offence relating to the affairs of the company. The managing agent will also have vacate office if he is adjudged an insolvent.

#### *Term of appointment of Managing Agents :*

The maximum period for which a managing agent can now be appointed is twenty years, after which the managing agent can be reappointed for another term. But a managing agent will continue to function even after twenty years until all claims payable to the

managing agent are paid. Managing Agent appointed before the commencement of the Act of 1936 can remain in office until twenty years have elapsed from the commencement of the Act, after which they must be reappointed if they are to act as managing agents.

*Remuneration* The remuneration of a managing agent must now be on the basis of fixed percentage of the annual net profits of the company. A managing agent, however, may insert a provision in the agreement allowing for an allowance or a minimum payment in case of absence of or inadequacy of profits. But such a provision can only be effective if the company approves it by a special resolution.

*Restrictions on the powers of Managing Agents*  
There are the following restrictions and limitations on the powers of managing agents :

(i) No company can give to a managing agent of the company or to any partner of the firm, if the managing agent is a firm or to any director of the private company, if the managing agent is a private company, any loan out of the moneys of the company.

(ii) A managing agent, if the managing agency consists of an individual or private company, cannot enter into any contract for the sale, purchase or supply of goods and materials with the company except with the consent of three-fourths of the directors.

(iii) A managing agent cannot exercise the power to issue debentures in respect of the company, or except with the authority of the directors and within the limits fixed by them, a power to invest funds of the company.

(iv) A managing agent cannot on his own account engage in any business which is of the same nature as and directly competes with the business carried on by the company under his management or by a subsidiary company of such company.

(v) If the articles of a company provide for

the appointment of a certain number of directors by the managing agent the number to be so appointed by the managing agent must not exceed one-third of the whole number of directors except in the case of a private company.

### **Meetings of the company.**

There are three classes of meetings held by companies. (1) the statutory meeting, (2) the annual general meeting, and (3) extraordinary general meetings.

*Statutory meeting* : Every public limited company must, within a period of not less than one month and not more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company. This meeting is called the "statutory meeting". The director must, at least twentyone days before the day on which the meeting is held, forward a report to every member of the company. This report is called the "*statutory report*". It must be certified by at least two directors or by the Charman of the directors and must contain the following particulars

- (a) The total number of shares allotted
- (b) The total amount of cash received by the company in respect of all the shares allotted
- (c) An abstract of the receipts of the company and of the payments made thereout up to a date within seven days of the date of the report.
- (d) The names, addresses and descriptions of the directors, auditors, managing agents or managers, if any, and secretary of the company.
- (e) The particulars of any contract, the modification of which is to be submitted to meeting for its approval, together with the particulars of the modification or proposed modification.
- (f) An account of the preliminary expenses of

the company.

(g) Arrears, if any, due on calls from directors, managing agents and managers

(h) Particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares to any director, managing agent or manager

The object of the statutory report and meeting is to furnish the shareholders with full information of the results of the formation of the company and an opportunity of discussing those results before the company may embark on trading to any appreciable extent. The following further rules are to be complied with (1) The statutory report shall, as far it relates to the shares allotted by the company, and to the cash received in respect of such shares and to the receipts and payments of the company, be certified as correct by the auditors of the company (2) The directors shall cause a copy of the statutory report certified as required above to be delivered to the registrar for registration forthwith after the sending thereof to the members of the company (3) The directors shall cause a list showing the names, descriptions and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

In the event of any default in complying with above provisions, every director of the company who is guilty of or who knowingly and wilfully authorises permits the default shall be liable to a fine not exceeding five hundred rupees.

In case no statutory meeting is held within the last date on which such meeting ought to have been held, a shareholder, a creditor or the Registrar may apply to the Court for the winding up of the company after the expiry of fourteen days from such last date,

and the court may order for winding up in such an event. But the court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.

*Annual General Meeting.* A general meeting of every company shall be held within eighteen months from the date of its incorporation and thereafter once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting. If default is made in calling such a meeting every director or manager of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees and the court may on the application of any company, call or direct the calling of a general meeting of the company. The directors of every company must lay before the company in general meeting a balance sheet and profit and loss account, or in the case of a company not trading for profit, an income and expenditure account, for a period covering nine months from the date of the meeting, and in the case of the first meeting after incorporation. The balance sheet and the profit and loss account or the income and expenditure account must be audited by the company's auditor and the auditor's report must be attached thereto. Every company other than a private company must send a copy of such balance sheet and profit and loss account or income and expenditure account so audited together with a copy of the auditor's report to the registered address of every member of the company at least fourteen days before the meeting at which it is to be laid before the members of the company and shall deposit a copy at the registered office of the company for the inspection of the members. The directors must also attach to every balance-sheet a report about the state of the company's business, the amount, if any, which they recommend should be paid by way of dividend and the amount, if any, which

they propose to carry to a Reserve Fund.

*Extraordinary General Meeting.* Every general meeting of the company which is not the statutory or the annual general meeting is an extraordinary meeting. The directors may whenever they think fit, convene an extraordinary general meeting. The directors are also bound to convene an extraordinary general meeting on the requisition of the holders of at least one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, stating the objects of the requisition and signed by the requisitionists. If the directors fail to call a meeting within twenty-one days of the requisition, the requisitionists or a majority of them in value, may themselves call the meeting, provided they call the meeting within three months of the requisition. Any reasonable expense incurred by the requisitionists by reason of the failure of the directors to convene the meeting duly must be repaid to the requisitionists by the company and the company may deduct it from the fees of remuneration of the directors.

*Persons entitled to convene meeting.* The meetings of a company are usually called by directors. But unless articles provide otherwise two or more members holding not less than one-fourth of paid up share capital can call a meeting. The court is also competent to convene a meeting either at the instance of a shareholder or on its own initiative where it is otherwise impracticable to call a meeting.

*Rules as to the conduct of meetings.* Except in the case of a private company, notice of all meetings in writing must be given to every shareholder at last fourteen days before the holding of such meetings. The notice should be served personally on every shareholder, but if the articles allow, it may be served by post. The notice must be sufficient to show the members substantially the object of the meeting, *e.g.* a notice of resolution to increase the capital should

specify the amount of the proposed increase. If any special business is to be transacted, the notice must specify its nature. The only business which can be validly transacted at the meeting is to confirm or reject the proposal of which notice has been given. Alternatives proposed by way of amendment will not be in order, unless covered by the terms of the notice.

All business shall be deemed *special* that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting with the exception of sanctioning a dividend, the consideration of the accounts, balance-sheets and the ordinary report of the directors and auditors, the election of director and other officers in the place of those retiring by rotation and the fixing of the remuneration of the auditors.

*Quorum* : No business can be transacted unless a quorum of members is present. In the case of a company, the quorum for meetings of shareholders is generally fixed by the articles. But if the articles do not provide for the quorum, then, in the case of a public company at least five members, and in the case of a private company at least two members, must be present personally to form a quorum.

*Chairman* : The articles usually provide who is to be chairman. But if the articles are silent, each meeting chooses its own chairman, provided there is a quorum before the election of the chairman takes place.

It is the duty of the chairman :

1. To present order.
2. To see that the proceedings are regularly conducted.
3. To take care that the sense of the meeting is properly ascertained with regard to any question before it.
4. To decide questions arising for decision during the meeting.

He must allow the minority of the shareholders to have a reasonable time to put forward their arguments, but at the expiration of that time he is entitled, if he thinks fit, to put a resolution to the meeting that the discussion be terminated,

A chairman cannot adjourn a meeting at his own will, except in case of disorder. If, in any other case, he purports to do so, the meeting may elect another chairman and proceed with business. The chairman is not bound to adjourn a meeting, even if the majority desire him to do so, unless the articles otherwise provide.

If the articles provide the chairman may have a *casting vote*, in addition to his ordinary vote, exercisable only in the case of equality of votes prior to his using the casting vote.

*Voting* Every member of a company limited by shares has one vote in respect of each share. If the shares are turned into stock, then every member will have vote in respect of each hundred rupees of stock. A member of any company not limited by shares has only one vote irrespective of the number of shares he may hold.

*Poll*. All questions in a meeting are generally decided by a show of hands. But where voting by show of hands is considered unsatisfactory or where it is undesirable, a poll may be demanded. A poll can only be demanded by at least five members, or the chairman or any member or members holding not less than one-tenth of the issued capital which carries voting rights. The chairman then fixes the time and place for taking the poll and on a poll even absent members may vote through proxies.

*Proxy*. A 'proxy' is a stamped instrument in writing authorising a person to vote as proxy for a shareholder at a certain meeting. The person so authorised must be a shareholder himself. The proxy



must be signed by the appointer and deposited at the registered office of the company at least seventy-two hours before the time of the meeting. There can be no power to vote by proxy unless it is expressly provided for by the Articles

### Resolutions.

Resolutions may be (1) ordinary, (2) extraordinary, or (3) special.

An *ordinary resolution* is one passed by a simple majority of the members voting at the meeting. It deals with ordinary business, such as, passing of accounts, appointing directors and so on. No notice need be given of such ordinary resolutions unless the articles require. But notice of all ordinary resolutions to be proposed at the statutory meeting must be given.

An *extraordinary resolution* is a resolution passed by a majority of at least three quarters of the members present at a general meeting who are entitled to vote and do vote, such meeting being convened by notice specifying the resolution and stating that it would be proposed as an extraordinary resolution. It is not necessary that all extraordinary business must be conducted by extraordinary resolutions unless the articles so require. It is usually used to wind up a Company voluntarily on the ground that it cannot continue its business by reason of its liabilities and that it is advisable to wind it up. The articles usually provide that directors may be removed by extraordinary resolution.

A *special resolution* is a resolution which must be passed by a three quarters majority of those entitled to vote and voting at the meeting, of which at least twenty-one days notice has been given specifying the resolution and stating that it would be proposed as a special resolution. Special resolutions are necessary for the following purposes among others :—

- (i) to alter the articles of the company,
- (ii) to alter the memorandum with leave of the court,
- (iii) to change the name of the company,
- (iv) to reduce the capital with leave of the court

Copies of special resolutions must be sent to Registrar within fifteen days from the date of their adoption.

### **Borrowing powers of the Company**

A company cannot borrow unless allowed by its memorandum. In the case of a Trading or Banking Company such a power, however, is implied even though it is not mentioned in the memorandum. A company may borrow money in the following ways: (a) by issuing debentures or debenture stock, (b) by issuing bills of exchange, hundis or promissory notes, (c) by mortgaging movable properties of the company; (d) by depositing the title deeds of the company and creating an equitable mortgage.

The most important of these methods of borrowing is the issue of debentures or debenture stock.

*Debentures* — A debenture is a document containing an acknowledgment of indebtedness to the holder thereof under certain terms and conditions contained in the document. These terms and conditions usually refer to the interest to be paid, the mode of repayment of the principal and the security given for ensuring these payments.

Debentures can be classified as follows on the basis of the terms and conditions of issue.

(a) *Simple or Naked debentures*.— The company by these debentures simply promises to repay the principal amount lent by the holders and also interest at fixed rates thereon. But such promise is not secured by any specific charge or mortgage of the

assets of the company or any part thereof The holders of these debentures, therefore, are unsecured creditors of the company

*Mortgage debentures.*— By these debentures the company's promise for payment of interest and repayment of the principal is secured by some charge or mortgage on the total assets, or any part thereof, of the company. If the debentures are secured by such a specific mortgage on any assets of the company so that the debenture-holders become the virtual owners of the assets, the debentures are known as *Debentures with a fixed charge or Fixed debentures*. If however, the debentures are secured only by such general charge or lien on the assets that the company can deal with the assets in any way they like in the interest of the business, the debentures are known as *Debentures with a floating charge or Floating Debentures*

(a) *Redeemable Debentures* — These debentures are such that the company reserves the right of paying them off and cancelling them on or after a certain date. Usually the redemption payment is made out of a fund specially created known as the Debenture redemption fund, or out of a fresh issue of debentures.

(d) *Irredeemable or Perpetual Debentures.*— These debentures are such that by the terms of their issue the company is never bound to pay them off except in the case of winding up or default in the payment of interest

A shareholder is fundamentally different from a *debenture-holder*. Money raised by the issue of shares constitutes the capital of the company, whereas the money contributed by a debenture-holder is only a loan due by the company. A shareholder shares profits either at a fixed rate of dividend or at a variable rate while a debenture-holder is entitled only to interest according to the terms of debentures. Debenture-holder can thus be paid off but a shareholder cannot be paid off except when the company is wound

up, or a reduction of capital is effected by remitting the uncalled money on shares. In case of winding up, the claims of debenture-holders have priority over those of shareholders,

*Debenture stock* A debt secured by debentures differs as much from debenture stock as shares from stock. Debenture stocks need not be of any particular denomination but may be subdivisible into any amount. Debenture stock is, therefore, the whole debt of the company merged in one lump. A debenture stockholder can, as such, lend either Rs 10/- or Rs 10/8/- or Rs -/11/- and so on as part of the total debt of the company, but debenture-holders cannot lend otherwise than in terms of fixed denominations, e.g. Rs 10/- or Rs 20/- or Rs 50/- or Rs 100/- and so on.

*Remedies of debenture-holders*—The following remedies are open to a debenture-holder who wants to realise his security and recover the money he has lent

(1) If the debenture is registered before the winding up of the company, the holder will be deemed a secured creditor and he will have priority over all other creditors. But if the debenture is registered after the winding up has already commenced, he will rank equally with other unsecured creditors.

(2) He may sue on behalf of himself and all other debenture-holders for the recovery of the money lent. In such a case "the court appoints a receiver, and if necessary a manager and declares the debentures to be a charge on the assets of the company and orders a sale of the property."

(3) He may present a petition for the winding up of the company.

(4) He may realise his security by foreclosure and sale when the company fails to make payment of the principal and interest as stipulated in the terms of

issue. Foreclosure means the process by which the right of the company to redeem the debentures is closed (*i.e.* barred)

(5) At any time after the principal money secured by the debenture becomes payable, the debenture-holder may in writing appoint any person or persons to be receiver or receivers of the property charged by the debenture. Any receiver so appointed shall have the power—

- (a) to get in and take possession of any of the property charged,
- (b) to carry on the business of the company;
- (c) to sell any of the property charged,
- (d) to make any arrangement or compromise which he shall consider to be in the interest of the debenture-holder.
- (e) to apply to the court to appoint a receiver.

*Receivers.* A receiver may be appointed (a) under a power contained in the debentures, or (b) under an order of the court. In either event, within fifteen days from the date of the order or of the appointment under the powers contained in the instrument notice must be given to the registrar who shall on payment of the prescribed fee, enter the fact in the register of mortgages and charges.

A court may appoint a receiver in a debenture holder's action for the recovery of money lent in the following cases :— (a) if the principal money lent has become due; or (d) if the company is wound up, or (c) if the security *i.e.* the debenture is likely to be jeopardised even though there has been no default in payment of interest and no winding up, *e.g.* if the property of the company is attached in execution of a decree obtained by a creditor of the company, or if the company has closed down its business or so on.

**Registration of debentures, mortgages and charges**

The following mortgages, and charges created by a company should be registered within twentyone days of their creation in order to have them treated as secured debts in case of winding up

(a) A mortgage or charge for the purpose of securing any issue of debentures, or

(b) a mortgage or charge on uncalled share capital of the company, or

(c) a mortgage or charge on any immovable property wherever situate, or any interest therein, or

(d) a mortgage or charge on any book debts of the company, or

(e) a mortgage or a charge, not being a pledge on any moveable property of the company except stock-in-trade, or

(f) a floating charge on the undertaking or property of the company

If any of the above mortgages or charges are not registered as aforesaid, they will be void against the liquidator appointed in the event of winding up and also against other creditors. They will rank only as unsecured debts. In certain cases where the court is satisfied that the delay is accidental, the court may extend the time for registration beyond twentyone days as aforesaid.

Where a debenture creates a charge on immovable property, even if it be for less than Rs. 100, it requires registration.

**Winding up of company**

There are three ways in which a company may be wound up. The winding up may be (1) by the court (2) voluntary, or (3) subject to the supervision of the court.

*Compulsory winding up by the court* A company

may be wound up by the court if

(1) it has by special resolution resolved to be wound up by the court.

(2) Default is made in delivering the statutory report to the Registrar or in holding the statutory meeting

(3) It does not commence business within a year from its incorporation, or suspends its business for a whole year

(4) The number of its members is reduced below seven, or two in the case of a private company.

(5) It is unable to pay its debts. A company is deemed unable to pay its debts—

(a) if a creditor to whom the company is indebted in a sum exceeding five hundred rupees serves a written notice on the company to pay and the company does not pay within three weeks,

(b) if a creditor, who has obtained a decree against the company, cannot get his decree satisfied;

(c) if the court is satisfied, after taking into account the contingent and prospective liabilities of the company, that the company is unable to pay its debt

(6) The court is of opinion that it is just and equitable to wind it up. A winding-up order will only be made on the ground of company not carrying on business if the company has no intention of carrying on business, or if it is impossible for it to carry on business.

The court has power to make a winding-up order in any case where the special circumstances are such that it appears just to make such an order. Orders have been made under the following circumstances :

(i) Where the substratum of the company has gone.

(ii) Where there is a deadlock in the management of the company.

(iii) Where the company has been formed to carry on a fraudulent or an illegal business.

(iv) In the case of a private company, where there has been mismanagement or misapplication of funds by the directors

(v) If the company is a "bubble", i.e. if it never had any business to carry on

(vi) Where the company is insolvent and is being carried on for the benefit of the debenture holders. In such a case the debenture holders by appointing a receiver can effectually bar the creditors from participating in the assets of the company.

The court will not order the company to be wound up merely because it is making a loss, if the majority of the shareholders are against a winding up

A company will not be wound up if the directors are acting within their legal powers although hardship may be caused. The shareholders' remedy is to sue the company and the directors

*Procedure in winding up by court:* To obtain a winding up by the court, a petition must be presented to the court having the necessary jurisdiction. Such petition may be presented either by the company, or by one or more creditors, or by a contributory, or by the registrar. A 'contributory' means any one who is liable to contribute to the assets of the company in the event of dissolution. It usually refers to a partly paid-up shareholder. A contributory can present a petition for winding up only when the number of members is reduced, in the case of a private company, below two, or in the case of any other company, below seven and the shares in respect of which he is a contributory have been held by him for at least six months during the eighteen months before the commencement of winding up. The registrar is not entitled to present a petition for winding up except when it appears from the balance sheet that the financial posi-



tion of the company is such that the company cannot pay its debts and the permission of the local government has been obtained for submitting such a petition. The petition for winding up must be verified by an affidavit, a copy of which must be served on the company. The day of hearing is appointed by the court and after hearing the parties and considering all the circumstances of the case, the court may either refuse to grant an order for winding up or order the winding up of the company. If the order for winding up is made, the court generally appoints an official liquidator or liquidators in order to conduct the proceedings in winding up of the company and to perform all such functions as are incidental to the winding up.

A winding-up order of the court has the following *consequences*:- (a) The company is deemed to be wound up from the date on which the petition for winding up was presented. (b) No suit or other legal proceedings can be proceeded with or commenced against the company without the leave of the court. (c) If any person has obtained a decree against the company he cannot execute the decree or attach the property of the company without the leave of court. (d) All the property of the company falls into the custody of the court from the date of winding-up order. The official liquidator takes charge of the properties as the agent of the court.

*Voluntary winding-up.* A company may be wound up voluntarily:-

(1) When the period, if any, fixed for its duration by the articles expires, or the event, if any, occurs on the occurrence of which the articles provide that it is to be dissolved, and the company in general meeting passes an *ordinary resolution* to be wound up voluntarily.

(2) If it resolves by *special resolution* to be wound up voluntarily

(3) If it resolves by *extraordinary resolution* that it cannot by reason of its liabilities continue its business and that it is advisable to wind up

There are *two kinds* of voluntary winding up, (a) Members' voluntary winding up, (b) Creditors' voluntary winding up

A *members' voluntary winding up* only takes place when the company is solvent. The majority of the directors must deliver to the Registrar a statutory declaration that the company is *solvent* and that the company will be able to pay its debts in full within three years from the commencement of the winding up. After the above statutory declaration the shareholders must meet and pass a resolution, ordinary, special or extraordinary as the case may be, for the winding up of the company,

The winding up is entirely by the members and the liquidator appointed by them, and no meeting of creditors is held. The company in general meeting appoints a liquidator or liquidators and fixes his remuneration for the purpose of winding up and distributing the assets of the company among the creditors. On the appointment of a liquidator all the powers of the directors come to an end except so far as the company in general meeting, or the liquidator, sanction their continuance.

If the winding up continues for more than a year the liquidator must summon a general meeting of the company at the end of the first year from the commencement of the winding up and of each successive year and lay before the meeting an account of his conduct. After the affairs of the company are fully wound up, the liquidator must prepare a final account and call a general meeting of the company called the 'final meeting' which must be properly advertised. Within a week of the final meeting the liquidator must send a copy of the account and a return of the meeting to the Registrar. The Registrar registers the

accounts and returns and at the end of three months from such registration the company is dissolved.

*Creditor's voluntary winding-up* : If no declaration of solvency is filed with the Registrar, and the shareholders pass a resolution for winding-up, the winding up is a creditors' winding up. In this case, the company in a general meeting passes a resolution for voluntary winding up without any prior declaration of solvency by the directors. The company must call a meeting of the creditors for the same day, or on the next following day, on which the above meeting is held. The directors must lay before the meeting of the creditors a statement of the position of the company and a list of creditor. One of the directors is to preside over the meeting of the directors. The following further rules apply :-

The creditors and the shareholders may in their respective meetings nominate a person as liquidator, but if they choose different persons to act as liquidator, the nominee of the creditors shall become the liquidator

The creditors may appoint a *committee of inspection* consisting of ten members of whom not more than five are to be nominated by the shareholders.

If the winding up continues for more than a year the liquidator must summon a general meeting of the company and a meeting of the creditors at the end of the first year from the commencement of the winding up, and of each successive year and lay an account before the meetings

On the affairs of the company being finally wound up, the liquidator must make up final account and call final meetings of the company and the creditors and lay the account before the meeting. Within a week after the meetings the liquidator must send to the registrar a copy of the account and a return of the meetings. The registrar shall register

the account and the return, and on the expiry of three months from such registration the company is dissolved

*Effect of voluntary winding up -*

(1) The voluntary winding-up is deemed to commence from the passing of the resolution which sanctioned it.

(2) After the commencement of the winding up no shares can be transferred without the sanction of the liquidator

(3) Members cannot alter their status after the commencement of winding-up. Thus, where shares were transferred to a minor after the winding-up it was held that the minor could not ratify the transfer after he attained majority as he cannot change his status as a minor after the winding-up

(4) The legal entity of the company and powers appurtenant to that continue to exist until the company is completely dissolved

*Winding-up subject to supervision of court:—*  
When a company has passed a resolution for voluntary winding up, the court may order that the winding up shall continue subject to such supervision of the court, and with such liberty for creditors, contributories, or others to apply to the court, and generally on such terms and conditions as the court thinks just. The effect is that the liquidator may exercise all his powers without the sanction of the court as in a voluntary winding-up, but subject to such restrictions as the court may direct

The grounds on which an order for supervision is made are generally (a) partiality of the liquidator; or (b) non-observance of the rules of winding up; or (c) negligence or dilatoriness on the part of the liquidator in realising the assets; or (d) the winding up resolution being obtained by fraud.

**Powers and duties of liquidators.**

The powers of a liquidator are the following :-

(a) to institute or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company ;

(b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the same ;

(c) to sell the immovable and movable property of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels ;

(d) to do all acts and to execute, in the name of and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the company's seal ;

(e) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent; and rateably with the other separate creditors ;

(f) to draw, accept, make and endorse any bill of exchange, *hundi* or promissory note in the name of and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, *hundi* or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business ;

(g) to raise on the security of the assets of the company any money requisite ;

(h) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a con-

tributory or his estate which cannot be conveniently done in the name of the company; and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself, provided that nothing herein empowered shall be deemed to affect the rights, duties and privileges of any Administrator General,

(1) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets

In the case of compulsory *liquidation*, the *official liquidator* has power to exercise the above-stated powers with the sanction of the court although the court may provide by an order that the official liquidator may exercise any of the above powers without the sanction or intervention of the court. In the case of *voluntary liquidation*, the voluntary liquidator may, without the sanction of the court, exercise all the powers as stated above. In the case of supervision liquidator, the supervision liquidator shall have the same power, and shall be subject to the same obligations, and in all respects stand in the same position, as if he had been appointed by the company *ie* as in the case of voluntary liquidation.

*Duties of liquidator* The following are the duties of the official liquidator:

(a) He must keep proper books of account and also minute books in which the minutes of proceedings of meetings must be entered.

(b) He must submit to the court an account of his receipts and payments at least twice a year.

(c) He may call general meetings of the creditors or contributories in order to ascertain their wishes.

(d) He must prepare a list of the contributories after giving them notice and hearing their objection. This list is later on settled by the Court, the effect of

which is to make every person included in the list liable to make contribution towards the assets of company.

(e) He must collect the assets of the company, make calls as the court directs, and distribute the assets amongst the creditors, and if any surplus be left, to distribute it amongst the contributories according as the articles provide.

(f) He must convene a meeting of the creditors within one month from the date of the winding-up order in order to find out whether the creditors want to appoint a committee of inspection to assist the liquidator. If the creditors want a committee of inspection the liquidator must convene a meeting of the contributories to accept the decision of the creditors or reject it. If the shareholders accept the decision, a committee of inspection is appointed with 12 representatives from the creditors and contributories. The committee has the right to inspect the accounts of the official liquidator. If, however, the shareholders reject the decision, the official liquidator must apply to the court for direction as to whether the committee is to be appointed or not, and if appointed as to who should be its members.

The following are the duties of a liquidator in voluntary wind-up.

(1) In case of a member's voluntary winding up the liquidator must, if the winding up continues for more than a year, summon a general meeting at the end of the first year and of each successive year and lay before the meeting an account of his conduct. The liquidator must also call a final meeting of the shareholders on the affairs of the company being wound up finally.

(2) In case of a creditor's voluntary winding up the duty of the liquidator is the same as (1) above excepting that along with the calling of the general meeting of the company after the first year and also

of the final meeting, the meetings of the creditors must also be called.

### **Distribution of assets.**

After the assets of the company are fully realised all the expenses in connection with the winding up must be paid first. The surplus is then used to make the following preferential payments

(1) All rates, taxes, revenues and cesses due from the company

(2) All wages and salary of any clerk or servant and all wages of any labourer or worker in respect of service rendered within two months before the winding up, not exceeding Rs 1,000/- for each clerk or servant, and not exceeding Rs 500/- for each labourer or workman.

(3) Sums due to any employee under the Workmen's Compensation Act, or under any provident fund or pension fund maintained by the company

(4) The expenses of any investigation by the Central Government

After the above payment if any balance remains, the unsecured creditors must be satisfied, and if any surplus is left even after that it is to be distributed amongst the contributories, *i.e.*, the shareholders. The above preferential payments do not, however, affect secured creditors

### **Accounts**

Every company is required to maintain proper books of account, with respect to —

- (a) all receipts and expenses and the transactions to which they relate;
- (b) all sales and purchases of goods, and
- (c) the assets and liabilities of the company.

The account books must be kept at the registered office or such other place as may be prescribed by



the directors and must be kept open to inspection by the directors during business hours.

### **Annual Balance Sheet and Profit and Loss Account**

According to Sec 131 of the Indian Companies Act the Directors of a company must at some day not later than 18 months after the incorporation of the Company and subsequently once at least in every calendar year lay before the company in general meeting a balance sheet and profit and loss account or in the case of a company not trading for profit an income and expenditure account for the period, in the case of the first account since the incorporation of the company and in any other case since the preceding account, made up to a date not earlier than the date of the meeting by more than 9 months or in the case of a company carrying on business or having interest outside British India by more than 12 months, provided that the Registrar may for any special reason extend the period for submission of such balance sheet and profit and loss account by a period not exceeding 3 months

A report of the Directors must be attached to the balance sheet as to the state of the company's affairs, the amount recommended to be paid as dividend, and the amounts to be carried to reserve-fund

The balance sheet must contain a summary of —

- (1) the authorised capital;
- (2) the issued capital;
- (3) the liabilities;
- (4) the assets with the particulars showing the nature and liabilities of the assets and showing how the fixed assets have been arrived at.

The balance sheet must also show separately —

1. the preliminary expenses;
2. the expenses of any issue of shares or debentures;

- 3 the amount of the goodwill, patent and trade marks,
- 4 all the debts of the company which are (if ascertainable) secured on any of its assets must be stated to be secured:
- 5 commissions and discounts on shares and debentures of shares
- 6 loans for the purchase of shares by employees
- 7 the number and amount of any redeemable debentures,
- 8 particulars as to debentures which have been redeemed but are available for re-issue,
- 9 shares in and loans to subsidiary companies,
10. the balance sheet of a holding company must show particulars as to its subsidiary company,
- 11 the amounts and loans as to directors and officers,
- 12 the total amount paid to the directors for remuneration.

The balance sheet must be audited and signed by two directors or one if there is only one. The auditor's report must be attached to the balance sheet and read to the company in general meeting

The profit and loss account must include particulars showing the total of the amount paid whether as fees, percentages or otherwise to the managing agent, if any, and the directors respectively as remuneration for their services and the total of the amount written off for depreciation.

The balance sheet and the profit and loss account or an income and expenditure account are to be authenticated in the case of a banking company by managing agent and where there are more than three directors of a company, by at least 3 of the directors and where there are not more than 3 directors by all

the directors and in the case of other companies by 2 directors or when there are less than two directors by the sole director and by the manager or managing agent (if any) of the company.

A copy of the balance sheet and profit and loss account or an income and expenditure account together with a copy of the auditor's report must be sent to the registrar and every member of a company at least fourteen days before the meeting at which the same are to be laid before the members of the company.

After the balance sheet and profit and loss account or the income and expenditure account as the case may be have been laid before the company at general meeting, 3 copies thereof signed by the manager or secretary of the company must be filed with the Registrar within 21 days after the date of the general meeting. If the balance sheet is not passed at the general meeting a statement to that effect and of the reasons thereof must be annexed to the balance sheet and to the copies thereof required to be filed with the Registrar.

If in any return, report, balance sheet, or certificate any statement is made which is for any reason not true as regards any material particular, and if it is done wilfully knowing it to be false, a person so doing is punishable with imprisonment and fine.

### **Auditors**

It has already been noticed that the annual balance sheet and the profit and loss account of every company must be audited once a year by an auditor. The articles of a company usually provide for the appointment of auditors as follows.—

The first auditors may be appointed by the directors before the statutory meeting, and if so appointed they will hold office until the first annual general meeting, unless previously removed by resolution of

the members of the company in general meeting, in which case such members at that meeting may appoint auditors. Subsequently a company must appoint at each annual general meeting an auditor or auditors to hold the office until the next annual general meeting. If it is proposed to appoint a person other than the retiring auditor, notice of intimation to nominate that person to the office of auditors must be given by a member of the company to the company not less than fourteen days before the annual general meeting and the company must thereupon send a copy of such notice to the retiring auditor and give notice thereof to its members either by advertisement or in any other manner allowed by the articles not less than seven days before the annual general meeting.

The following persons cannot be appointed Auditors —

- (a) A director or officer of the company
- (b) A partner of such director or officer (except in case of a private company)
- (c) Any person indebted to the company and if any person being appointed auditor becomes indebted to the company his appointment shall thereupon be determined

If no appointment is made by the company the Central Government on the application of a member has the power of appointing an auditor and fixing his remuneration.

An auditor may be removed before the next annual general meeting by a resolution in a general meeting.

### **Powers and duties of auditors.**

The auditors' duties are —

- (1) To make a report to the members of the company on the accounts examined by them and on every balance sheet, profit and loss account laid before

the company in general meeting during their tenure of office and the report must state briefly

(a) Whether or not they have obtained all the informations and explanations they have required;

(b) Whether or not in their opinion the balance sheet and the profit and loss account referred to in the report are drawn up in conformity with the law; and whether or not such balance sheets exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company, and

(d) Whether in their opinion books of account have been kept by the company as required by Sec. 130 of the Companies Act.

(2) In order to make a report as mentioned above the auditors have a right of access at all times to the books and accounts, and vouchers of the company and are entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

The auditors are entitled to receive notice of and attend any general meeting of the company at which any accounts which have been examined or reported on by them are to be laid before the company and may make any statement or explanation they desire with respect to the accounts.

The auditors must make themselves acquainted with their duties under the companies articles and under the Companies Act. But they are not bound as to the legal responsibilities.

They must be honest and must exercise reasonable care in the discharge of their duties; otherwise they may be sued for damages. But it is not their duty to give advice and have nothing to do with the way in which the business is carried on. They

have nothing to do with the prudence or imprudence of making loans and it is nothing to them whether the business of the company was being conducted prudently or imprudently, profitably or unprofitably. Their duty is to ascertain and state the true financial position of the company at the time of the audit. But in ascertaining the true financial position of the company they are not bound to be defective and they are justified in believing the servants of the company and in ascertaining that they are honest provided they take reasonable care. They are watchdogs only and not blood hounds. But if there is any thing wrongly calculated they should probe it to the bottom and must not confine themselves merely to the task of verifying the arithmetical calculation of the balance sheet. They should ascertain by comparison with the books of the company it was properly drawn up so as to show the correct financial position.

If the auditors fail in their duty to state the correct financial position of the company and it suffers damage, the auditors are liable for such damage.

## CHAPTER X.

# CARRIERS

### **Kinds of carriers**

The term "carrier" covers any one who carries goods or passengers whether for reward or not and is wide enough to include a railway owned and controlled by Government which takes upon itself the duty of carrying goods from one place to another. Carriers are broadly divided into (a) carriers of goods and (b) carriers of passengers. Carriers of goods are again subdivided into (i) common or public carriers, (ii) private-carriers and (iii) gratuitous or voluntary carriers. Generally speaking the duties and liabilities of carriers in India are governed by the Common Law of England, except when modified by the Indian Carriers Act of 1865 and Carriers (Amendment) Act of 1921. In case of railways the Indian Railways Act of 1890 governs the position. In the case of carriage by air the Indian Aircraft Act of 1934 deals with that question.

### **Common carriers**

A common carrier is a person including any association or body of persons whether incorporated or not, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately. It must transport goods or property and not persons and must transport goods as a business and not merely as casual occupations. It must transport goods for hire and not gratuitously and must carry goods indiscriminately for all, i. e. cannot choose to serve some people and refuse to serve others. A

carrier by sea is not to be regarded as a common carrier.

*Duties of a common carrier* A common carrier must carry the goods of the class he professes to carry of anybody who delivers them to him, and who offers to pay reasonable hire, unless, of course, the goods are not of the description which he professes or is accustomed to carry or are of such nature as would expose him to exceptional danger or there is no accommodation for the goods, or the goods are brought too late or too long a time before the journey is to begin. If he refuses to carry the goods without justification he may be sued by the consignor of the goods. He may claim payment in advance, *i.e.* before he carries, but not before he receives the goods.

A common carrier must carry the goods by his ordinary route, not of necessity the shortest, without unnecessary deviation or delay. He must deliver the goods at the time agreed upon, or, where no time is stipulated within a reasonable time having regard to the circumstances of the case. If *perishable goods* get spoiled on the way and the carrier believes that he will not be able to deliver them in good condition, he has the power to sell them. This sale is known as "*sale of necessity*" and before the sale is made as far as possible the carrier is expected to obtain instructions from the owner of the goods.

A common carrier must deliver the goods to the consignee and to provide a place for their delivery. He will be liable for any loss arising from his neglect to do so. But in the absence of agreement he is not bound to deliver the goods at the house of the consignee and his liability ceases when he has brought the goods to the station of destination, and given to the consignee notice of arrival and allowed the consignee a reasonable time in which to remove the goods. Before the goods are taken delivery of by the owner or the party to whom they are sent, the carrier has to



warehouse them, the carrier's responsibility as carrier ceases and the only responsibility which now continues is that of a common bailee under the Indian Contract Act.

*Rights of a common carrier:* A common carrier is not bound to carry goods unless the sender is ready and willing to pay his reasonable charge or there is accommodation for the goods or the goods are of the description which he is accustomed to carry or the goods are not likely to subject him to exceptional danger. He is not bound to treat all customers equally and may at his option allow special concession to some only. He is not, however, allowed to charge an unreasonable payment from any customer. He has a particular lien on the goods he carries in respect of his charges and he can retain the goods until his charges are paid.

*Liability for loss or damage:* The liabilities of a common carrier in India are the same as under the English common law subject to the modifications introduced by the Carriers Act, 1865. At common law, a common carrier is an insurer of the safety of the goods carried, and therefore he is liable for any injury to them, whether occasioned by his negligence or not. But to this rule of absolute liability there are five *exceptions*, and the carrier is not liable if the loss or damage is caused by:— (i) the act of God; (ii) the King's enemies; (iii) inherent vice in the thing carried; (iv) bad packing; and (v) war.

Apart from the liabilities of an insurer, a common carrier may incur liability to the owner of the goods for any damage or loss which the latter may suffer in consequence of any breach of duty by the carrier even though the goods may have arrived safely *i.e.* if the owner suffers damage independently of any deterioration of the goods themselves owing to the delay in delivering the goods. A case is cited where the plaintiff consigned certain books by railway for

selection by a committee as text books for schools and the books did not reach the destination until long after such selection was made due to an extraordinary delay in transit so that the books became completely valueless for the plaintiff. It was held that the plaintiff was entitled to the price of the consignment by way of damages.

A common carrier may, by entering into special agreement with the consignor exempt himself from liability for all loss and damage including those occasioned by his own negligence, or limit his liability to a particular kind or particular kinds of loss and damage. It is doubtful if a common carrier can, by a special agreement, relieve himself of liability for any loss caused by his own criminal act or that of his agents: for such an agreement would be void as against public policy or illegal. But the mere insertion of a general clause which exempts a carrier from liability for any loss or damage to the goods entrusted to him will not exempt a carrier from liability for any loss or damage occasioned by his own negligence or that of his servants or agents unless such exemption is expressly provided for in plain, express and unambiguous terms by inserting in the special agreement something equivalent to what is known as the negligence clause.

The Carriers Act of 1865 affects the common liability of a carrier as follows.—

For the purpose of defining the liabilities of a common carrier this Act divides articles which may be consigned into two categories, namely (i) *the scheduled articles* and the *non-scheduled articles*. The scheduled articles are those enumerated in the schedule to the Act and which are unusually valuable or unusually perishable, *i. e.* gold, silver, jewellery, silk, paintings, engravings, title-deeds, currency notes or coins, bills, hundies etc. The non-scheduled articles are those which are not included in the schedule to the Act and which are of an ordinary kind, *e. g.*, wheat and rice

and not unusually valuable or perishable.

As regards the *scheduled articles* a common carrier is not liable for any loss of or damage to a scheduled article exceeding Rs. 100/- in value excepting when it is caused by a criminal act of the carrier, his servants, or agents, unless the value and description of the article is declared by the consignor or his duly authorised agent at the time when the goods are delivered to the carrier whether such loss or damage is caused by the negligence of the carrier or not. He is allowed to charge an additional rate for undertaking the increased risk of carrying a scheduled article provided a scale of charges containing the additional rate is publicly exhibited in his place of business in English as well as the vernacular language of the place. A common carrier is liable for any loss of or damage to a scheduled article entrusted to him for carriage and is bound to return any sum which might have been paid as the charge for carriage, where the consignor or his agent has properly declared the value and description of the article and had paid or agreed to pay the increased rate, if any, and the carrier cannot limit his liability in this respect by any special agreement.

As regards *non-scheduled articles*, a common carrier may limit his liability for the loss of or damage to goods, entrusted to his care, by special contracts signed by the owner or his duly authorised agent excepting when such loss or damage is caused by the negligence or criminal act of the carrier or any of his agents or servants. Any special agreement which purports to exempt the carrier from liability for his own negligence or criminal act or that of his servants or agents is void and inoperative as being illegal and in contravention of the provisions of the Act.

The burden of proof of absence of negligence is on the common carrier on the principle that the loss or damage to the goods is *prima facie* proof of negli-

gence and the court must presume negligence in the absence of any proof to the contrary.

In the event of injury to the goods carried, the carrier is not bound to accept the declared value as the real value of the goods, but may insist on the party suing proving their real value. He is only liable for their real value, if it does not exceed the declared value.

Any person who has an interest in the goods consigned and suffers loss of or damage to the goods can maintain a suit against the common carrier to whom the goods were entrusted for carriage whether he was a party to the contract of carriage or not or in the language of law whether there was privity between him and the carrier or not. Thus a consignee to whom the property in the goods has passed or a mortgagee of the goods or even an insurer who has paid the owner for the loss of the goods, can maintain an action against the carrier for loss or damage to the goods.

It is to be observed that no suit can be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when a loss or injury first came to the knowledge of the plaintiff. Notice to a local agent of the carrier is a valid notice even though such local agent may also be the agent for another carrier.

*Limitation.* A suit against a carrier, which includes a common carrier, for compensation for loss of or injury to goods must be instituted within one year of the time when the loss or injury occurs and a suit for compensation for non-delivery of or delay in delivery of the goods must be instituted within one year of the time when the goods ought to be delivered.

#### **Private Carriers.**

A private carrier is one whose trade is not that

of conveying goods from one person or place to another but who undertakes upon occasion to convey the goods of another and receives reward for so doing. A private carrier differs from a common carrier in that he is either one (a) who undertakes to carry for reward on occasions but not as a public employment or (b) one who while inviting all and sundry to employ him as carrier for reward, reserves the right to accept goods at his option.

*Liability of a private carrier.* The liability of a private carrier is like that of a bailee. He is liable only for such loss or damage as is caused by his negligence *i. e.* by his failure to take as much care of the goods entrusted to him as a man of ordinary prudence would under similar circumstances, take of his own goods. But a private carrier is not liable if the owner keeps the goods under his control *e. g.* when a passenger carries his own luggage, or if the loss is as likely to have arisen from the misconduct of the owner or his want of care, as from that of the carrier.

#### **Gratuitous Carrier.**

A gratuitous carrier is a person who undertakes to carry goods or passengers gratuitously *i. e.* without reward. No action can be maintained against a gratuitous carrier for refusing to carry goods or passengers after he has undertaken to do so for the contract is *nudum actum i. e.*, unenforceable for want of consideration, but once a gratuitous carrier accepts goods for carriage he is in the position of a bailee and his liabilities become the same as that of a private carrier, *i. e.* he will be liable for any loss or damage caused by his own negligence or that of his agent.

#### **Carriage by rail.**

In the case of railway companies the liability is controlled by sections 72 to 82 of the Indian Railways Act, 1890. The liability of railways is that of a bailee under the Contract Act and not that of an insurer as under the common law in respect of the loss,

deterioration or destruction of goods and animals, carried by them. A railway company, however, is regarded as a common carrier so far as its duties to the general public are concerned so that it cannot refuse to carry goods tendered to it without the justification recognised in common law or make unreasonable delay in delivering the goods or refuse to deliver them without justification.

Even as regards the liability of a railway company, it must be observed that a railway company has been held liable as a common carrier for any damage suffered by reason of any breach of common law duty by the carrier excepting when such damage is caused by the loss, destruction or deterioration of the goods. The liability of a railway company is like that of a bailee only when such liability arises from the loss, destruction or deterioration of the goods or animals carried by it and not otherwise. Thus the liability of a railway for non-delivery of goods which have not been lost or damaged or for undue delay in delivering goods or for injury to the person of passengers would not be governed by the Indian Railways Act, 1890, but by the common law.

*Liability of railways* As already observed, the responsibility of a railway administration for the loss, destruction or deterioration to be carried by railway is that of a bailee under the Indian Contract Act. Thus the duty of a railway administration is to take reasonable care only and it will be liable for the loss, destruction or deterioration of goods or animals entrusted to it in the following cases only.—

(a) if the goods or animals are lost or damaged owing to the neglect of the railway or its servants to take such reasonable care as a man of ordinary prudence would, under similar circumstances, take of his own goods

(b) if the goods or animals are lost or damaged for any reason after the railway has made default in

delivering the goods or animals, at the proper time.

The general liability of a railway as a bailee is further limited in the following cases:—

(a) *Carriage of articles mentioned in the second schedule to the Indian Railways Act, 1890*: A railway administration is not liable for the loss, destruction or deterioration of any parcel or package, containing any article of special value mentioned in the second schedule to the Railways Act *e.g.*, gold, silver, silk, pearls, jewellery, watches, government and other securities, paintings, engravings etc, the value whereof exceeds Rs 100/- unless the person sending or delivering the same declares the value and contents thereof at the time of the delivery of the package or parcel to the railway for carriage and paid or agreed to pay an additional rate as insurance against the extra risk of carrying the same, if so required by the railway. If the consignor does not declare the value and contents of a package containing such article, exceeding Rs 100/- in value or does not pay the additional rate when required by the railway, he cannot recover any loss or damage even though it may be caused by the negligence of the railway or its servants. Where such value and contents have been declared the railway is liable to pay up to the declared value if any loss or damage occurs, but the burden of proving the value so declared to have been the true value shall, notwithstanding anything in the declaration, be on the person claiming the compensation. A railway may, before accepting any parcel or package declared to contain such an article examine the contents of the parcel or package in order to ascertain that it really contains such an article. When a consignor sends any such article declared as such without paying the additional rate the practice of the railway is to take from the consignor an agreement in risk note Form called X or Y whereby the consignor agrees to absolve the railway of all liability in consideration of the

articles being carried at the ordinary rate

(b) *Carriage of animals* Unless declared of higher value at the time of delivery for carriage by railway, by the person sending or delivering an animal, the liability of a railway administration as a bailee, for the loss of or damage to animals delivered to it cannot in any case exceed, in the case of elephants or horses Rs 500/- a head or, in the case of mules, camels or horned cattle, Rs 50/- a head or, in the case of donkeys, sheep, goats, dogs or other animals Rs 10 a head. Where such higher value has been declared the railway may charge an additional rate as insurance against the extra risk involved in their carriage. In case of any loss or injury to an animal delivered to the railway for carriage, the burden of proving the value of the animal or the extent of the injury is on the person who claims compensation for such loss or injury.

It should be noted, however, that the railway will be liable as a bailee only when such loss or injury results from the negligence or misconduct of the railway or its servants. But the onus of proving absence of negligence is on the railway where it is proved that the animal which dies or gets injured was fit and healthy at the time it was loaded in a truck.

(c) *Carriage of passenger's luggage*: A railway administration is not responsible for the loss, destruction or deterioration of any luggage belonging to or in charge of a passenger unless a railway servant has booked and given a receipt therefor. This does not, however, mean that the railway is liable in every case of loss of or damage to a passenger's luggage. Its liability in this respect is also like that of a bailee and will arise only if the loss or damage is caused by its own negligence or misconduct or that of its servants. Thus if the passenger takes his luggage completely out of the control of the railway *eg*, by keeping it in his compartment and the luggage is lost by his own



negligence the railway will not be liable for the loss. .

(d) *Carriage under special agreement or risk notes.* Most of the railway companies issue what is known as the "risk note" which is made out in a form approved by the Governor-General in Council (now the Federal Railway authority) and has to be signed by the owner of the goods, under which, in consideration of the company agreeing to carry the goods at a specially reduced rate, the owner of the goods exonerates the company from all risks in transit. The usual form used by the railway lays down to the effect that in consideration of the goods being charged for at a special reduced rate, the owner of the goods agrees to hold "the railway company and their agents harmless and free from all responsibility for any loss, destruction or deterioration of or damage to the bales from any cause, except for the loss of a complete consignment or of one or more complete packages forming part of the consignment due either to the *wilful neglect* of the railway company or to theft by or to wilful neglect of their servants or agents, before, during or after transit." There are several kinds of risk notes which have been approved by the Governor-General in Council and which are in current use, namely, risk notes A, B, C, D, E, F, G, H X and Y. Risk notes C, X and Y exempt the railway from liability in every case of loss and damage, however caused. Risk notes A, B, D, G and H absolve the railway of liability for any loss or damage excepting where it is caused by the misconduct of the railway's servants. Risk notes E and F limit the liability of the railway to specified sums agreed to as the maximum payable by the railway in respect of loss of or damage to certain classes of animals carried under the notes and relieve the railway of liability to pay even limited sums unless the loss or damage is caused by the negligence or misconduct of the railway company or that of their servants. Some "risk notes" provide further that the term "*wilful neglect*" should not be held to include fire, robbery from a running

train, or any unforeseen event or accident. In case such a risk note is given by the consignor he can recover only in case the goods were lost through the 'wilful neglect' of the company's servants or theft by such servants. If the consignor makes out a *prima facie* case, the company must prove that there was neither such wilful default nor theft. In other words, the burden of proof is thrown primarily on the plaintiff.

A risk note is properly signed if signed by the authorized representative in his own name. Attestation by witnesses though provided for in form H is not necessary. The term 'fire' as used in this form is not *ejusdem generis* with the words "any unforeseen event" as used there. The company's liability comes into operation as soon as goods are tendered and accepted even though no receipt is given. When goods are carried by *several carriers in succession* and they are consigned to one of them and there is short delivery at the destination, the fact that loss occurred when they were carried by one of the other carriers does not absolve the last carrier because contract here was one and indivisible. It has also been decided in a Bombay case that where packages were received safe but the contents of some were missing, the railway company was not liable though wilful default was proved.

**Risk note "A" :** When goods which are tendered to a Railway for carriage are either in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit the practice of the railway is to take an agreement from and signed by the person delivering in risk note form "A", the effect of which is to relieve the Railway of all liability from any condition in which the goods may be delivered to the consignee or for any loss or damage excepting when such loss or damage is caused by the misconduct of Railway's servants. Misconduct is not negligence.

It is some positive act or some wilful omission to do something which it is the duty of the Railway to do and is opposed to accident or negligence.

*Risk Note "B":* When a consignor sends goods or animals at a "special reduced" or "owner's risk rate" instead of an alternative "ordinary" or "risk acceptance" rate, the practice of the Railway Administration is to accept the goods or animals under an agreement in risk note form B signed by the sender which exempts the Railway from all liability for any loss of or damage to the goods or animals excepting when such loss or damage is caused by the misconduct of the Railway's servants, the burden of proof of which will be on the person claiming compensation. But in the case of non-delivery of the whole of a consignment or the whole of one or more packages forming part of the consignment not due to fire or accident or in the case of pilferage from such package or packages, the Railway administration must in the first instance disclose how it dealt with the consignment and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct. If from such disclosure, misconduct cannot be inferred the person claiming compensation must prove misconduct.

*Risk Note "C"* When goods, which should normally be carried in covered wagons, carts or boats and which are liable to damage if not so carried, are accepted for carriage in open wagons, carts or boats at the sender's request, the Railway Administration to which the goods are tendered accept the goods to be so carried under an agreement in risk note form "C" signed by the sender which exempt the Railway from all liability however caused, even though no reduced rate is charged by the railway in this case. But the Railway is exempted from liability only if the loss occurs during transit. If any loss occurs after the transit has terminated and the goods have reached their destination, the Railway will be liable as a bailee.

if the loss is occasioned by its negligence or misconduct or that of its servants

*Risk Note "D"* This form is used when a sender consigns dangerous, explosive or combustible articles at a "special reduced" or "owner's risk" rate instead of an alternative "ordinary" or "risk acceptance" rate quoted in the tariff. This relieves the railway from all liability for any loss or damage excepting when such loss or damage is caused by the misconduct of the railway or its servants.

*Risk Note "E"*. An agreement in risk note form "E" signed by the consignor is used by a Railway administration when booking elephants or horses of a declared value exceeding Rs 500/- a head, mules, camels or horned cattle Rs 50/- a head, donkey, sheep, goats dogs or other animals Rs 10/- a head, without the payment of the additional rate as authorised by section 73 of the Indian Railways Act, 1890. When animals are booked under this risk note the Railway is liable only upto the amounts fixed by section 73 of the Act, namely, Rs 500/- a head for elephants or horses, Rs. 50/- a head for mules or horned cattle, and Rs 10/- a head for donkeys, sheep, goats, dogs and other animals, provided any loss or damage is caused by its negligence or that of its servants.

*Risk Note "F"* When horses, mules and ponies are tendered for despatch in cattle truck or horse wagons instead of in horse boxes, the practice of a Railway Administration is to book them subject to an agreement in risk note Form "F" signed by the consignor which exempts the Railway in excess of Rs 50/- per head for any loss, destruction or deterioration of or damage to any such animal despatched under the note. But the Railway will not be liable even to pay for this limited liability unless the loss or damage is caused by negligence or misconduct or that of its servants. The reason for this limitation of liability is that the rate for carriage in cattle truck or horse wagons is lower than the horse-box rate.

*Risk Note "G"*: Risk note "G" is used as an alternative to Risk Note "D" when the sender desires to enter into a general agreement for the series of consignments instead of executing a separate Risk Note for each consignment. It is Risk Note "D" with slight alterations in the language so as to make it applicable to more than one consignment.

*Risk Note "H"*: Risk note "H" is used as an alternative to Risk Note "B", when the sender desires to enter into a general agreement for a series of consignments. It is in fact Risk note "A" with only such alterations as are necessary to make it applicable to more than one consignment.

*Risk Note "X"*: As has already been noted, a Railway Administration is not liable for any loss of or damage to article mentioned in the second schedule to the Railways Act, 1890, exceeding Rs 100/- in value unless the consignor declares the value and contents of any consignment containing such an article and pays or undertakes to pay the additional rate, if required by the Railway Administration. Where the consignor declares the value and contents of such a consignment but does not pay or agree to pay the additional rate, the Railway accepts the consignment for carriage under an agreement in risk not Form "X" which relieves the Railway of all liability for any loss of or damage to the consignment, howsoever caused. The Railway need not take such a risk note, for even in the absence of a risk note, the Railway will not be liable for any loss or damage. But the Railway insists on it as a matter of practice,

*Risk Note "Y"*. Risk Note "Y" is used as an alternative to Risk Note "X", when the sender elects to enter into a general agreement for a term not exceeding six months for despatch of series of consignments containing excepted articles specified in the second schedule to the Indian Railways Act, 1890, exceeding Rs. 100/- in value without payment of the additional

rate, instead of executing a separate risk note for each consignment. The form of Risk Note "Y" is the same as that of Risk Note "X" except certain minor alterations in the language in order to make it applicable to more than one consignment

*Claim for refund or compensation* A person is not entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway

The person who can sue a Railway for any loss of or damage to goods or animals delivered to the Railway, is the person in whom the property in the goods or animals is vested. The person whose property the goods are is *prima facie* the party with whom the contract is made. Thus where the property in the goods still remains vested in the consignor after their delivery to the carrier, as where a vendor consigns the goods to the buyer reserving the right of disposal, the consignor is the only person who can sue. But where goods are delivered to a Railway by the seller for conveyance to the buyer and the receipt is made over to the buyer, the buyer alone, who is the consignee, can sue for any loss of or damage to the goods. Similarly, any person to whom the consignor has endorsed the railway receipt can institute a suit against the Railway for any loss or damage as he becomes entitled to the goods by virtue of such endorsement

### **Carriage by sea.**

A carrier by sea may be a common carrier, but he usually makes a special contract in respect of the goods he carries. Such a contract is called the *contract of affreightment* and the price of the carriage is called

the *freight* The contract of affreightment may take the form of—(a) a *charterparty*, or (b) a *bill of lading*

*Charterparty*. A charterparty is a document by which the owner of a ship either—(1) lets his ship to a person called the *charterer* for the purpose of carrying a cargo, or (11) undertakes that his ship shall carry a cargo for the charterer.

If the charterparty operates as a lease or demise of the ship, the charterer becomes for the time being the owner of the vessel and the master and crew become his servants. If, on the other hand, the charterparty only gives the charterer a right to have his cargo carried by a particular ship, the master and crew, although placed at the charterer's service, do not become the servants of the charterer.

A charterer may himself ship the cargo or enter into sub-contracts with separate shippers, who may ship cargo by the chartered ship under separate bills of lading.

*Bills of Lading*: A bill of lading is a document signed by the shipowner, or by the master or other agent of the shipowner, which states that certain goods have been shipped on a particular ship, and sets out the terms on which those goods have been delivered to and received by the shipowner. Where a charter-party is drawn out the bill of lading forms a simple acknowledgment of the receipt of the goods on board and refers to the conditions in the charter-party under which the goods are received. In a "*general ship*" (where the master or the owner of a ship has agreed with separate shippers to convey goods to the place of her destination), there is no charter-party, as here the voyage is undertaken on the owner's account, a large number of merchants shipping their goods to be carried to the ports at which the steamer is to call in the course of its voyage. Thus in a general ship, the shipowner acts as a common carrier, carrying goods for all who desire to send them, to the ports declared

by him and there the bill of lading, besides forming an acknowledgment of the safe receipt of the goods, contains various conditions and stipulations making up the contract. The practice in this case is that the shipper, on delivering his goods on board, receives from the captain a provisional receipt for the goods known as the "*Mate's receipt*", which is exchanged by him for the regular bill of lading at the office of the shipping company concerned.

*Procedure* The procedure is somewhat as follows

The voyage is first advertised, usually by means of shipping cards. The prospective shippers book different spaces on the ship for their goods by means of a *freight engagement notes*. In most cases there is a concluded agreement between a shipper and the owner as soon as the shipper books a space, the shipper being deemed to have agreed to ship his goods and the shipowner being regarded as having agreed to carry the same on the terms of his usual bill of lading. The shipper then delivers his goods to those who are in charge of the ship and is given in exchange a *mate's receipt* signed by one of the ship's officers or the ship's agent which shows that the goods have been delivered to the ship. The shipper then usually preserves three forms of bills of lading appropriate to the transaction and fills them up with the necessary details. These forms along with the mate's receipt are then taken to the shipowner who signs them and returns one of the signed bills of lading to the shipper retaining the other two signed bills of lading and the mate's receipt for himself.

*Form of Bill of Lading* : The usual form of bill of lading is the "*shipped*" bill of lading, so called because it usually commences with the words "*shipped in apparent good order and condition*" or words to the like effect, and acknowledges the actual receipt of the goods on board a named ship. The other form known



as "*received for shipment*" simply acknowledges that goods have been received by the shipowner for shipment and does not admit whether the goods have been put on board a ship or not. When the bill of lading is issued in India, the carrier, whether the shipowner or the charterer as the case may be, must under the Carriage of Goods by Sea Act, 1925, issue a 'shipped' bill of lading if the shipper so demands. But if the shipper has previously taken a "received for shipment" bill of lading or a similar document of title he must surrender it when he takes a 'shipped' bill of lading. The carrier may, however, at his option note the fact of shipment and the name or names of the ship or ships upon which the goods have been shipped on a bill of lading already issued instead of issuing a fresh "shipped" bill of lading and on such noting the bill of lading already issued will be deemed a 'shipped' bill of lading.

A bill of lading usually contains a statement as to the condition of the goods and a bill of lading issued in India must state the apparent order and condition of the goods. The carrier cannot evade his obligation by stating "weight, quality and quantity unknown". Where a bill of lading states that the goods have been shipped in "good order and condition" it will amount to an admission that the goods were in good order and condition at the time of shipment so far as could have been judged by the exterior of the goods.

A bill of lading including a similar document of title issued in respect of cargo shipped from an Indian port must contain the following:

(a) It must contain a clause paramount *i.e.*, a statement that it is to have effect subject to the rules laid down in the Act

(b) It must contain statements sharing among others (1) the lading marks necessary for identification of the goods as the same are furnished in writing by

the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or in the cases of coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage, (ii) the number of packages or pieces or the quantity or weight, as the case may be, as furnished in writing by the shipper, and (iii) the apparent order and condition of the goods, provided that no carrier, master or agent of the carrier, should be bound to state or show in the bill of lading any marks, number, quantity or weight which has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking

*Effects of a bill of lading* The effects of a bill of lading issued under a charterparty are as follows

A bill of lading is binding on the shipowner if signed by the *master* (who represents the shipowner as his agent for various purposes) within the ordinary scope of his authority even if the ship is chartered *unless the charter amounts to a demise*, or the shipper knew of the existence of the charter at the time of shipment and the shipper can sue the owner if the goods are lost or damaged by any cause not excepted in the bill of lading

2 Where a bill of lading is issued to a shipper other than a charterer, who ships goods on a ship which is chartered by way of a demise, the charterer alone is liable for any loss or damage to the goods covered by the bill of lading whether the shipper knew of the charter or not.

3. Where a shipper has notice that the ship is chartered and that under the charter the master is the agent of the charterer in signing bills of lading, the shipper can sue the charterer only for any loss or damage even if the charter does not amount to a demise.



the carrier will not be liable even to a transferee for value if the bill was obtained by misrepresentation or fraud of the holder of the bill or the shipper or some person under whom the holder claims or if the holder knew at the time of the transfer of the bill to him that the statements in the bill were incorrect

3 In the case of a bill of lading issued in India, the shipper is deemed to guarantee the accuracy of the statements furnished by him *e g* as regards the quality or quantity of the goods and incorporated in a bill of lading and is bound to indemnify the carrier for any loss, damage or expenses arising from any inaccuracy in such statement *e g* when the carrier becomes liable to a bonafide transferee for value

4 Where any particular weight of a bulk cargo is accepted by a third party other than the carrier and is incorporated as such in a bill of lading issued in India such weight as stated in the bill of lading will not be *prima facie* evidence against the carrier and the shipper will not also be deemed to guarantee the accuracy thereof and the carrier will not be liable for any deficiency in the weight even to a transferee of the bill of lading for value

*Bill of Lading a document of title* A bill of lading has been defined as a document of title in the Indian Sale of Goods Act, 1930 Its function is two-fold, namely, (a) it serves as an evidence of the contract between the shipper and the carrier and (b) it serves as a symbol of the goods shipped. A cargo at sea, while at the hands of the carrier, is generally incapable of physical delivery During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates on a symbolic delivery of the cargo Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties, that the property should pass, just as under similar circum-

stances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which, in the hands of a rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.

*Transfer of Bill of Lading:* A bill of lading making goods deliverable "to order" or "to order or assigns" of the consignee or "to order" or "to order or assigns" of a blank name is by mercantile custom negotiable by indorsement and delivery and a bill of lading making goods deliverable to bearer is similarly negotiable by mere delivery. But a bill of lading, which makes goods deliverable to a specified person and does not show on the face of it that it is transferable *e. g.* where it does not show that the goods are deliverable to the "order or assigns" of the consignee or of a blank name, is not negotiable. Indorsement may be effected by the shipper on the consignee trusting his name on the back of the bill. The indorsement may be "in full" or special, *i.e.* in favour of a specified person in which case the indorsee transfers it again only by reindorsing it. The indorsement may however, be "in blank" in which case the bill of lading may be transferred again by mere delivery.

A bill of lading, however, is not regarded as a negotiable instrument. The characteristic feature of a negotiable instrument is that a holder in due course acquires a valid title to the instrument, even as against the true owner, irrespective of any defect in the title of his transferor in all cases excepting when he derives his title through a forged indorsement. But the holder

of a bill of lading takes the bill subject to any defect in the title of his transferor or any person from whom his transferor derives his title whether he is a holder for value without notice of such defects or not. A bill of lading is thus negotiable only in a popular sense and not in a technical sense.

### **Warranties and terms**

The following warranties are implied in every contract of affreightment unless they are excluded by clear and unambiguous words -

(1) *Warranty of seaworthiness* A carrier by contracting to carry goods in a ship impliedly warrants that his ship is seaworthy for the purpose of the particular voyage, that is, she is fit in all respects to carry her cargo safely to its destination, having regard to all the ordinary perils to which such a cargo would be exposed on such a voyage. The seaworthiness must exist not only at the commencement of loading but also at the time of sailing from the port of loading. Where a voyage is to be performed in different stages during which the ship requires different kinds of, or further, preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of her preparation or equipment for the purposes of that stage.

Where the undertaking as to seaworthiness is broken and the shipper discovers it before the voyage begins he can treat the contract as repudiated by the shipowner and refuse to load his goods. But if he discovers the breach subsequently he can recover any loss sustained by him by reason of the unseaworthiness. Unlike the common law, the shipowner under the Carriage of Goods by Sea Act, 1925, is only to exercise due diligence to make the ship seaworthy where goods are shipped under a bill of lading whether under a charterparty or not. The shipowner is not, therefore, liable in cases of shipments under bills of lading issued in India for any unseaworthiness which could not be

discovered by due diligence or care. But the shipowner cannot, by any express provision in a bill of lading, relieve himself of his liability for any loss caused by his neglect or default in exercising due diligence to make the ship seaworthy which he is still permitted to do under the common law where goods are shipped under a charterparty.

(2) *Implied warranty of reasonable despatch:* In every contract of affreightment the carrier impliedly undertakes that the ship "shall be ready to commence the voyage agreed on, and to load the cargo to be carried, and shall proceed upon and complete the voyage agreed upon, with all reasonable dispatch. A breach of this undertaking may amount to a repudiation of the contract or may give the shipper only the right to recover damages for any loss which he may have suffered due to delay.

In some cases the circumstances which cause the delay may render the performance of the contract impossible and bring about what is called in the language of maritime contract "frustration of the commercial purpose of the adventure", as for instance, when a ship is requisitioned by the Government before the voyage starts or where the ship is detained at the port of loading by an order of the Government as a result of war. In such a case doctrine of impossibility of performance applies, and the rights and obligations of both parties come to an end excepting that any party who has received any benefit under the contract, is bound to restore it to the other party under the Indian Contract Act.

(3) *Implied warranty against deviation:* In the absence of any express stipulation, the shipowner under a contract of affreightment, impliedly undertakes to proceed in the ship without unnecessary deviation from the proper route of the voyage. Where the route is fixed by the contract, the route so fixed is the proper route. Where no route is fixed by the

contract, the usual and customary route from the port of loading to the port of discharge would be the proper route and this need not necessarily be the shortest route

(4) *Implied warranty by shipper not to ship dangerous goods* In every contract of affreightment there is an implied warranty by the shipper that the goods he ships are not dangerous or so packed that they may be dangerous. If he ships such goods he will be liable to any person who is injured by the shipment of such dangerous goods excepting where the shipowner had notice of the dangerous character of the goods or ought to have known such dangerous character or had full opportunity of observing such dangerous character

Goods may be dangerous within this principle if owing to legal obstacles as to their carriage or discharge they may involve detention of the ship

### **Duties of a carrier by sea under the Carriage of Goods by Sea Act.**

The duties imposed by the Act on a carrier by sea under a bill of lading are as follows :-

(1) The carrier is bound, beforehand at the beginning of the voyage, to exercise due diligence to—  
(a) make the ship seaworthy, (b) properly man, equip and supply the ship, (c) make the holds, refrigerating and coal chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation

(2) The carrier must properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried subject to the immunities granted to him under the Act

### **Liabilities of a carrier.**

A carrier by sea carrying goods under a bill of lading issued in India or a similar document of title is absolutely liable for any loss or damage to or in con-



nection with goods arising from the negligence, fault or failure of the carrier in the duties and obligations imposed on him by the Act. Any clause in the contract of carriage which would relieve the carrier or the ship from liability for such loss or damage would be null and void. But a carrier carrying goods otherwise than under a bill of lading, *e.g.* under a charterparty where no bill of lading is issued to the charterer is at liberty to enter into any agreement in any terms as to his liability for such goods whether by way of exempting his liability altogether or otherwise provided such an agreement is not illegal or contrary to public policy. Where goods are shipped under a contract, the terms of which are embodied in a receipt which is not negotiable and marked as such, the carrier may enter into any contract relieving his liability, whether arising from his breach of duty under the Act or not, in any terms provided the agreement is not illegal or contrary to public policy and the goods, which are agreed to be carried, are not ordinary shipments in the ordinary course of trade but are such as the circumstances, conditions and terms of their carriage are such as would reasonably justify a special agreement *e.g.* articles of special value like gold or silver or the carriage of ordinary commodities in time of war or similar emergencies.

A carrier by sea or a shipowner carrying goods under a bill of lading or a similar document of title is entitled to the following immunities under the Carriage of Goods by Sea Act, 1925, unless he surrenders the immunities or agrees to increase his responsibility and liability in a greater degree than is required by the Act.-

(1) A carrier or shipowner is not liable for any loss or damage arising or resulting from unseaworthiness of the ship unless such loss or damage is caused by want of due diligence on the part of the carrier to make the ship seaworthy and to properly man, equip and supply the ship and to make the holds, refrigera-

ting and coal chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation. If, however, any loss or damage is caused by unseaworthiness, it is for the carrier to prove that he exercised due diligence and care

(2) A carrier or a shipowner is not liable for any loss or damage arising or resulting from—

(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or the management of the ship

(b) Fire unless caused by the fault or privity of the carrier

(c) Perils, dangers and accidents of the sea or other navigable waters

(d) Act of God *e.g.* a tempest

(e) Act of public enemies

(f) Arrest or restraint of princes, rulers or people, or service under legal process

(g) Quarantine restriction

(h) Act or omission of the shipper or owner of the goods, his agent or representative

(i) Act of War

(j) Strikes or lock-outs or stoppage, or restraint of labour from whatever cause, whether partial or general

(k) Riots and civil commotions

(l) Saving or attempting to save life or property at sea

(m) Wastage in bulk or weight or any other loss, or damage arising from inherent defect, quality or vice of the goods

(n) Insufficiency of packing,

(o) Insufficiency or inadequacy of marks.

(p) Latent defects not discoverable by due diligence.

(q) Any other cause arising without the actual fault of the carrier or without the fault or neglect of his agents but the carrier has to prove that the loss or damage was not caused by his fault or by the fault or neglect of his agents.

(3) A carrier is not liable for any loss or damage resulting from any deviation in saving or attempting to save life or property at sea or from any other reasonable deviation.

(4) A carrier or a shipowner will not in any event be liable for any loss or damage to goods in any amount exceeding £ 100/- per package or unit, or the equivalent of that sum in any other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. By agreement between the carrier and the shipper the maximum of £ 100/-; payable by the carrier where goods exceeding that value are not declared, may be increased but not reduced. The declaration required by the Act in order to make the carrier liable for any sum greater than £ 100 is *prima facie* evidence of the truth of the facts contained therein but is not conclusive against the carrier who is at liberty to prove that the goods were not in fact of the declared value or nature in case any loss or damage is caused to the goods and claims are made against the carrier on the basis of the declared value. If the nature and value of the goods have been knowingly misstated by the shipper in the bill of lading the carrier will not be liable in any event for loss or damage.

(5) Goods of inflammable, explosive or dangerous nature, which have been shipped without the knowledge and consent of the carrier, may be landed at any place at any time prior to their discharge or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods is

liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. Even if such goods are shipped with the knowledge and consent of the carrier, his master, or agent, the carrier may, if they become a danger to the ship or cargo, land them at any place or destroy or make them innocuous without liability on the part of the carrier except the liability to contribute to a general average loss where they are destroyed or sold at an under-value before discharge.

(6) Unless notice of any loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods or if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading excepting where there has been a joint survey and inspection at the time of removal. In any event the carrier is discharged from all liability in respect of loss or damage unless a suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. In the case of any actual or apprehended loss or damage, the carrier and the person who receives the goods must give all reasonable facilities to each other for inspecting and tallying the goods.

Certain immunities are granted by the Merchant and Shipping Act, 1894, also

### **Duties of master of the ship.**

The master is the highest officer on board a ship. In popular language he is known as the Captain. On a voyage under a contract of affreightment the master occupies a double position, namely, (1) he is in general the agent of the shipowner in doing what is necessary to carry out the contract, and (2) he is in case of necessity and for the preservation and benefit of the cargo, the agent for the cargo-owners.

As an agent of the shipowner he has to perform all the duties of the shipowner under the charterparty and he can also deal with the ship in times of necessity or emergency as a man of ordinary prudence would do under the circumstances. Thus, he signs bills of lading in favour of charterer or shippers and provides necessaries which the ship-owners have to provide under the charterparty.

The master derives authority to act as an agent of the cargo-owner in a manner inconsistent with the ordinary rights of the cargo-owner e. g. by selling the goods or throwing them overboard or pledging them for advances of money under two circumstances (1) the necessity for the action: (2) the impossibility of communicating with the shipowners or cargo-owners or the absence of their instructions when communication has been made to him

### Freight

"Freight" in the ordinary mercantile sense, is the reward payable to the carrier for the carriage and arrival of the goods in a merchantable condition, ready to be delivered to the merchant. In the absence of agreement the carrier is entitled to the freight stipulated in a contract of affreightment if he has substantially performed the contract by delivering the goods in a merchantable condition. Thus he is entitled to the freight even if the goods are delivered in a damaged condition provided the goods remain as merchantable articles of the particular description. But no freight is payable if the goods are lost whether by reason of excepted perils or not, unless the contract of affreightment provides for advance freight or a lump sum freight or the goods are lost due to the fault of the shipper alone. Thus a carrier cannot in the absence of express agreement claim a proportionate freight for the part of the voyage during which the goods are carried if the goods

are lost and cannot be delivered at the port of destination.

Generally speaking, the freight is taken to be due on completion of the voyage when the goods are ready for delivery. If a part of goods are lost during the voyage, the freight on that part would not be payable. In every charter-party, however, special stipulations as to freight are inserted. If the stipulation lays down specifically that the freight is payable in advance, then if the ship commenced its voyage and was lost thereafter, no part of the freight paid in advance is returnable. The *advance freight* falls due at the moment the ship commences its voyage, and if not paid it can be recovered by the shipowner even in case of the loss of the ship. Besides, the freight may be payable per ton, per package, or in a lump sum. If the hirer does not give a full cargo as agreed, he would have to make good the damage known as the *dead freight*.

If a claim in the form of damage suffered by shipowners through the improper detention of the ship by the merchant is made, it falls under the heading of *demurrage*. This claim arises from a cause generally inserted in a charter-party or in a bill of lading. In the latter case it is to be found in the form of a marginal clause. A person claiming and receiving the goods under the bill of lading is answerable for this payment. The rule is

"where the time is expressly ascertained and limited by the terms of the contract, the merchant will be liable to an action for damage, if the thing be not done within the time, although this may not be attributable to any fault or omission on his part, for he has engaged that it shall be done"

The "lay days" commence to run from the moment of time the charterer has had notice of the ship's arrival and readiness to take or discharge cargo. "Days" may be "running" or "working". If they are not expressed to be "working days" they are to be taken to mean "running days" unless the custom of a particular port gives some other meaning to those expressions.

It has also been held that the charterer cannot set off time saved at the port of discharge against demurrage incurred at the port of loading. The charter-party usually states the number of "lay days" allowed for loading and unloading the cargo and also lays down the sum per day payable in case of delay exceeding the "lay days" allowed. If the "lay days" are named but the charge for demurrage is not specifically stated, the shipowner can, notwithstanding, claim damages for the delay.

### Carriage of goods by air.

In the case of carriage of goods by air, the carrier has a right to require the consignor to make out and hand over to him a document called an "*air consignment note*", which the consignor has a right to require the carrier to accept. The absence, irregularity or loss of this consignment note will not affect the validity of the contract of carriage. The consignment note is to be made out in *three original parts* and handed over, along with the goods, to the carrier, the first part being marked "for the carrier" and signed by the consignor, the second marked "for the consignee" and signed by both the consignor and carrier, and the third which will be signed by the carrier and returned to the consignor against the goods he accepts. Where there are more packages than one, separate consignment notes may be demanded by the carrier.

The consignment note contains the place and date of execution, place of departure and destination, names and addresses of the consignor, carrier and consignee, and the nature of the goods. The number of packages must also be stated in addition to the mode of packing, the weight as well as quantity and value, their condition, the freight agreed to be paid and the place of payment and the rules relating to liability. If the goods are not C. O. D. (cash on delivery), the price of the goods, the value declared, if

any, the time for completion of carriage and the route to be followed in brief and a statement that the carriage is subject to the rules regarding liability contained in the Schedule to the Act. The carrier will not be entitled to avail himself of the provisions of the Schedule to the Act of limiting or excluding his liability, if he accepts the goods without a consignment note. The consignor is responsible to give particulars of the goods and in case the carrier suffers any loss or damage through the irregularity or inaccuracy of the statement the consignor will be liable to compensate him accordingly.

The carrier is liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. In the same way he is liable for loss or damage of the registered goods. This is, however, subject to the condition that if the carrier can prove that he and his agents had taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures, the carrier may not be liable, in a case of accident to passenger, whereas in regard to luggage also the carrier is not liable if he can prove that the damage was occasioned by negligent piloting or negligence in the handling of the aircraft or in navigation and that, in all other respects he and his agents had taken all necessary measures to avoid the damage. Liability in the case of passengers is limited to 125,000 francs. In case of registered luggage and of goods the liability of the carrier is limited to 250 francs per kilogram, unless the consignor has declared the value of the package and paid or agreed to pay extra freight. Where the carriage is partly by air the rules will only apply as far as carriage by air is concerned.



### Carriage of passengers by air.

In the case of *passengers* a carrier has to deliver a ticket containing particulars as to the place and date of issue, places of departure and of destination, agreed stopping places (with a reservation to alter them in case of necessity), the name and address of the carrier, and a statement that the carriage is subject to the rules relating to liability contained in the schedule.

In the case of *luggage* also a ticket has to be given containing almost similar particulars as in the case of passengers, but also stating the passenger's ticket, the number and weight of the packages, and the amount of the value declared. It further provides that the absence, irregularity or loss or the luggage coupon does not affect the existence of the validity of the contract of carriage. However, the carrier has to state particulars as required by the Act on the ticket, otherwise he is not entitled to avail himself of the provisions of the Act which exclude or limit his liability

### Carriage of passengers by railway

*Entering compartment reserved or already full*  
Every railway administration is required to fix, subject to the approval of the general controlling authority, the *maximum* number of passengers which may be carried in each compartment of every description of carriage, and exhibit the number so fixed in a conspicuous manner inside or outside each compartment, in English or in one or more of the vernacular languages in common use in the territory traversed by the railway, or both in English and in one or more of such vernacular languages as the general controlling authority, after consultation with the railway administration, may determine. Similarly, every railway administration is bound, in every train carrying passengers, to reserve for the exclusive use of females one compartment at least of the lowest class of carriage

forming part of train One such compartment so reserved must, if the train is to run for a distance exceeding fifty miles, be provided with a closet

If a passenger, having entered a compartment which is reserved by a railway administration for the use of another passenger, or which already contains the maximum number of passengers exhibited therein or thereon as noted above, refuses to leave it when required to do so by any railway servant, he is punishable with fine which may extend to twenty rupees -

If a passenger resists the lawful entry of another passenger into a compartment not reserved by the railway administration for the use of the passenger resisting or not already containing the maximum number of passengers exhibited therein or thereon as explained above, he shall be punished with fine which may extend to twenty rupees

If a railway servant compels or attempts to compel, or causes any passenger to enter a compartment which already contains the maximum number of passengers exhibited therein or thereon as aforesaid, he shall be punished with fine which may extend to twenty rupees

*Ticket or pass for travelling required* Every person desirous of travelling on a railway is entitled, upon payment of his fare, to be supplied with a ticket, specifying the class of carriage for which, and the place from and the place to which, the fare has been paid, and the amount of the fare. Fares shall be deemed to be accepted, and tickets to be issued, subject to the condition of there being room available in the train for which the tickets are issued A person to whom a ticket has been issued and for whom there is not room available in the train for which the ticket was issued shall on returning the ticket within three hours after the departure of the train be entitled to have his fare at once refunded A person for whom there is not room available in the class of carriage for

which he has purchased a ticket and who is obliged to travel in a carriage of a lower class shall be entitled on delivering up his ticket to a refund of the difference between the fare paid by him and the fare payable for the class of carriage in which he travelled

No person is entitled, without the permission of a railway servant, to enter any carriage on a railway for the purpose of travelling therein as a passenger unless he has with him a proper pass or ticket. Every passenger by railway is duty bound, on the requisition of any railway servant appointed by the railway administration in this behalf, to present his pass or ticket to the railway servant for examination, and at or near the end of the journey for which the pass or ticket was issued, or, in the case of a season pass or ticket, at the expiration of the period for which it is current, deliver up the pass or ticket to the railway servant. A *return ticket* or *season ticket* is not transferable and may be used only by the person for whose journey to and from the places specified thereon it was issued.

If a person, with intent to defraud a railway administration, (a) enters any railway carriage without proper pass or ticket or (b) uses or attempts to use a single pass or single ticket which has already been used on a previous journey or, in the case of a return ticket, a half thereof which has already been so used, he shall be punished with fine which may extend to one hundred rupees in addition to the amount of the single fare for any distance which he may have travelled.

If a passenger travels in a train without having a proper pass or a proper ticket with him, or, being in or having alighted from a train, fails or refuses to present for examination or to deliver up his pass or ticket immediately on requisition being made therefor by a railway servant, he shall be liable to pay, on the demand of any railway servant appointed by the railway administration in this behalf, the excess charge accord-

ing to the scale laid down below, in addition to the ordinary single fare for the distance which he has travelled or, where there is any doubt as to the station from which he started, the ordinary single fare from the station from which the train originally started, or, if the tickets of passengers travelling in the train have been examined since the original starting of the train, the ordinary single fare from the place where the tickets were examined or, in case of their having been examined more than once, were last examined.

*Excess charge* (a) Where the passenger has immediately after incurring the charge and before being detected by a railway servant notified to the railway servant on duty with the train the fact of the charge having been incurred, the excess charge will be one rupee, two annas or eight annas, and (b) in any other case, be six rupees, one rupee or three rupees, according as the passenger is travelling or has travelled or has attempted to travel in a carriage of the highest class or in a carriage of the lowest class or in a carriage of any other class or kind *Provided* that such excess charge shall in no case exceed the amount of the ordinary single fare which the passenger incurring the charge is liable to pay as noted above

If a passenger travels or attempts to travel in or on a carriage, or by a train, of a *higher class* than that for which he has obtained a pass or purchased a ticket, or travels in or on a carriage beyond the place authorised by his pass or ticket, he shall be liable to pay, on the demand of any railway servant appointed by the railway administration in this behalf, the excess charge at the rates mentioned above, in addition to any difference between any fare paid by him and the fare payable in respect of such journey as he has made, *provided* that such excess charge shall in no case exceed the amount of the difference between the fare paid by the passenger incurring the charge and the fare payable in respect of such journey as he has made.

If a passenger liable to pay the excess charge and fare mentioned above, fails or refuses to pay the same on demand being made therefor, the sum payable by him can be recovered by any Magistrate as if it were a fine imposed on the passenger by the Magistrate on receipt of an application from any railway administration in this behalf,

*Transferring any half of return ticket:* If a person sells or attempts to sell, or parts or attempts to part with the possession of, any half of a return ticket in order to enable any other person to travel therewith, or purchase such half of a return ticket, he shall be punished with fine which may extend to fifty rupees, and, if the purchaser of such half of a return ticket travels or attempts to travel therewith, he shall be punished with an additional fine which may extend to the amount of the single fare for the journey authorised by the ticket.

*Altering or defacing pass or ticket.* If a passenger wilfully alters or defaces his pass or ticket so as to render the date, number or any material portion thereof illegible, he shall be punished with a fine which may extend to fifty rupees.

*Means of communication in a train.* The safety controlling authority may require any railway administration to provide and maintain in proper order, in any train worked by it which carries passengers, such efficient means of communication between the passengers and the railway servants in charge of the train as the safety controlling authority has approved. A chain with a handle is provided in each compartment for this purpose. If a passenger, *without reasonable and sufficient cause*, makes use of or interferes with any means provided by a railway administration for communication between passengers and the railway servants in charge of a train; he shall be punished with fine which may extend to fifty rupees. What is a reasonable and sufficient cause is a question of fact. For

instance, it has been held that pulling the communication chain of a railway compartment to remove the overcrowding, which it is the duty of the railway administration to prevent as explained above, is a reasonable and sufficient cause. Where a passenger in the Inter class pulled the chain because it was overcrowded and because III class passengers had entered in, it was held that he was justified in pulling the chain and in stopping the train for enforcing his right to have the compartment vacated so as to bring down the number of passengers therein within the maximum limit prescribed by the Indian Railways Act, 1890. A who had instituted a civil suit against B was travelling with the latter in the same compartment with his account books. While the train was in motion B seized the account books and threw them through the window. A pulled the alarm chain and stopped the train. It was held that A had sufficient and reasonable cause for getting alarm signal. But in another case it was held that the mere fact that the accused left his coat even though it contained valuables was not a reasonable and sufficient cause for pulling the communication cord.

*Smoking* If a person, without the consent of his fellow-passengers, if any, in the same compartment, smokes in any compartment except a compartment specially provided for the purpose, he is punishable with a fine which may extend to twenty rupees. If any person persists in so smoking after being warned by any railway servant to desist, he may, in addition to incurring the liability mentioned above, be removed by any railway servant from the carriage in which he is travelling.

*Entering carriage or other place reserved for females* If a male person, knowing a carriage, compartment, room or place to be reserved by a railway administration for the exclusive use of females, enters the place without lawful excuse, or, having entered it,

remains therein after having been desired by any railway servant to leave it, he shall be punished with fine which may extend to one hundred rupees, in addition to the forfeiture of any fare which he may have paid and of any pass or ticket which he may have obtained or purchased, and may be removed from the railway by any railway servant.

*Power of arrest to railway servants of police-officer.* A person may be arrested without warrant or other written authority by any railway servant or police-officer, or by any other person whom such servant or officer may call to his aid, for any of the following offences (1) Drunkennes, (2) Endangering the safety of persons, (3) Entering carriag or other place reserved for females, (4) Drunkenness or nuisance on a railway; (5) Maliciously wrecking or attempting to wreck a train, (7) Maliciously hurting or attempting to hurt persons travelling by railway, (8) Endangering safety of persons travelling by railway by wilful act or omission, (9) Endangering safety of persons travelling by railway by rash or negligent act or omission, and (10) any minor committing any of the offences mentioned against serial Nos 6 to 9 above

A person so arrested must, with the least possible delay, be taken before a Magistrate having authority to try him or commit him for trial.

For any other offence under the Indian Railways Act, 1890, or on failure or refusal to pay excess charge or other sum demanded as explained above any person may be arrested without warrant or other written authority if there is reason to believe that such person will abscond or the name and address are unknown, and he refuses on demand to give his name and address, or there is reason to believe that the name or address given by him is incorrect. The person so arrested must be released on his giving bail or, if his true name and address are ascertained, on his executing a bond





## CHAPTER XI

### TRANSFER OF PROPERTY

#### **Law applicable.**

Transfer of property by act of parties is governed by the Transfer of Property Act, 1882, which extends to the whole of British India except the Punjab, the North-West Frontier Province and Delhi. Sections 54, 107 and 123 of the Act have, however, been extended to all Municipalities in the Punjab and all notified areas declared and notified under section 241 of the Punjab Municipal Act, 1911. Similarly, certain sections of the Act have been extended to Delhi also. Even although the Transfer of property Act is not in force in the Punjab, the Punjab courts, when deciding cases in which the principles of law dealt with by the provisions of this Act are involved, may adopt those provisions as embodying the law applicable to the case, especially where the law enunciated therein coincides with the principles of equity, good conscience and justice, and for which there is no statutory law applicable in the Punjab. But although the equitable principles underlying that Act are followed in the Punjab, the Act itself with its technicalities does not apply to that province.

#### **Immoveable property.**

The expression "immoveable property" is not defined in this Act. In the General clauses Act also the definition is not exhaustive. Under that Act it is taken to *include* land, benefits to arise out of land, and things attached to the earth, or permanently fastened to any thing attached to the earth. Under the Registration Act, 1908 "immoveable property" includes land,

buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops, or grass. The Transfer of Property Act also specifically *excludes* standing timber, growing crops or grass from the definition of "immovable property"

### **Transfer of property**

"Transfer of property" means an act by which a living person conveys property, in present or in future to one or more other living persons, and "to transfer property" is to perform such act

Living person includes a company or association or body of individuals, whether incorporated or not

### **Persons competent to transfer.**

Every person competent to contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances to the extent and in the manner allowed and prescribed by any law for the time being in force. A *minor* or a *lunatic* is thus incompetent to make a transfer of his property by sale, mortgage or lease. A lease by a minor is also void. So also a lease of property granted by the lessor at a time when he was mentally unfit and incapable of understanding the effect of the transaction is void. But a disposition of property by a lunatic during a lucid interval is considered as valid. A proprietor whose property is under the management of the Court of Wards cannot validly transfer his property

Persons authorised to dispose of transferable property not his own include the manager of a joint Hindu family, guardian, executor, administrator and trustee.

### Operation of transfer

What property is actually conveyed by a particular deed depends upon its own terms. Unless a different intention is expressed or necessarily implied, a transfer of property, passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the *legal incidents* thereof. Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth, and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith, and, where the property is machinery attached to the earth, the moveable parts thereof, and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

### Conditions relating to transfers.

(1) *Oral transfer*: A transfer of property may be made without writing in every case in which a writing is not expressly required by law. *Writing is necessary* in the case of the following instruments -

(a) Sale of immoveable property of the value of Rs. 100 or upwards.

(b) Sale of a reversion or other intangible thing.

(c) Simple mortgage irrespective of the amount secured.

(d) All other mortgages securing Rs. 100 or upwards.

(e) Leases of immoveable property from year to years or for any term exceeding one year, or reserving a yearly rent (excluding agricultural leases).

(f) Exchange

(g) Gift of immoveable property.

## (h) Transfer of an actionable claim

## (1) Notice of transfer of actionable claim.

No doubt oral transfers of any value are valid outside the municipal and cantonment limits in the Punjab, but when the transaction is intended to be a transfer by writing, it cannot be treated as an oral sale

(2) *Condition restraining alienation* Where property is transferred subject to a condition or limitation *absolutely restraining* the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is *void*, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him. But property may be transferred to or for the benefit of a *woman* (not being a Hindu, Muhammadan, or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein

Similarly, an interest created in favour of a person must be absolute and limitations directed against the free enjoyment of the property are void. Thus, where a vendor sells a portion of his property to the vendee by a deed of sale, and the vendee executes an *ikrarnama* in which he agrees that he would not collect the rents, that he would never demand partition of that portion, and that he would not alienate or mortgage it or otherwise exercise proprietary rights over it, such a covenant is void and cannot be enforced.

Also, where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is *void*. This, however, does not apply to a condition in a lease for the benefit of the lessor or those claiming under him

(3) *Conditional transfer.* An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the court regards it as immoral or opposed to public policy. Thus, if A lets a farm to B on condition that he shall walk a hundred miles in an hour, the lease is void. Again, if A transfers Rs. 500 to B on condition that she shall murder C, the transfer is void.

A condition may be *precedent* or *subsequent*. A condition precedent is fulfilled if it is *substantially* complied with. Thus, if A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E, and E dies and B marries with the consent of C and D, B is deemed to have fulfilled the condition. But a condition subsequent must be *strictly* fulfilled. A transfers Rs. 500 to B, to be paid to him on his attaining majority or marrying, with a proviso that if B dies a minor or marries without C's consent the said Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

(4) *Transfer by person authorized only under certain circumstances to transfer:* Where any person, authorized only under circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor or other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith. A, a Hindu widow, whose husband has left collateral heirs alleging that the property held by her as such is insufficient for her maintenance, agrees, for

purposes neither religious nor charitable, to sell a field, part of such property, to B B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance and that the sale of the field is necessary, and, acting in good faith, buys the field from A As between B on the one part and A and the collateral heirs on the other part a necessity for the sale shall be deemed to have existed

(5) *Transfer where third person is entitled to maintenance* Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immovable property, and such property is transferred, the right may be enforced against the transferee, if he has notice *thereof* or if the transfer is gratuitous, but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

(6) *Burden of obligation annexed to ownership* A contracts to sell Sultanpur to B While the contract is still in force he sells Sultanpur to C, who has notice of the contract B may enforce the contract against C to the same extent as against A.

(7) *Transfer by ostensible owner* Where, with the consent, express or implied, of the person interested in immoveable property, a person is the *ostensible owner* of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it; provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith. This principle, however, does not apply to a case where the document executed earlier had been presented for registration without undue delay but after the document executed later had already been registered.

(8) *Transfer by one co-owner.* Where one or two or more co-owners of immoveable property legally competent in that behalf transfers his share of such

property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part-enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred. *But* where the transferee of a dwelling-house belonging to an undivided family is not a member of the family, he is not entitled to joint possession or other common or part-enjoyment of the house.

(9) *Joint transfer for consideration*: Where immoveable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced. In the absence of evidence as to the interests in the fund to which they were respectively entitled or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

Similarly, where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration, equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

(10) *Transfer by co-owners of share in common*

*property* Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal proportionately to the extent of such shares

(11) *Priority of rights created by transfer* Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created. This rule applies only when there are completed valid transfers. The word "transfer" contemplates a complete transfer, and does not include a mere contract for sale or a sale by an unregistered sale-deed the registration of which is compulsory. If a contract of sale to one person is followed by complete sale to another, the rule in (6) above will apply. A registered deed of sale shall take effect *as against* ( and not *subject to* ) a mere contract of sale or an unregistered conveyance

(12) *Transferee's right under policy*: Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property. This rule also will only apply where the transfer is completed by payment of purchase money, and not where there is only contract of sale.

(13) *Rent bona fide paid to holder under defective title*: No person can be charged with any rents or



profits of any immoveable property which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits. As an illustration of it, A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B, is not chargeable with the rent so paid.

(14) *Improvements made by bona fide holders under defective titles*: When transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement. The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction. When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

(15) *Transfer of property pending suit relating thereto*. During the *pendency* in any court having authority in British India, or established beyond the limits of British India by the Central Government or the Crown Representative, of any suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any

decree or order which may be made therein except under the authority of the court and on such terms as it may impose. For this purpose, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

## SALE

### **Sale of immoveable property.**

"Sale" is a transfer of ownership in exchange for a price paid or part-paid and part-promised. Such transfer, in the case of tangible immoveable property (in areas where the Transfer of Property Act is applicable-see page 430) of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. In the case of tangible immoveable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

*Contract for sale.* A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on, such property.

*Rights and liabilities of buyer and seller.* In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned

in the following rules, or such of them as are applicable to the property sold :-

(1) *The seller is bound—*

(a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care, discover,

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power,

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto,

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents,

(f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits,

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such date, and except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) *The seller shall be deemed to contract with the buyer* that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. Where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no

act whereby the property is incumbered or whereby he is hindered from transferring it

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power

This is subject to the *proviso* that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require, and in the meantime the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident

(4) *The seller is entitled—*

(a) to the rents and profits of the property till the ownership thereof passes to the buyer;

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment, for the amount of the purchase-money or any part thereof remaining unpaid, and for interest on such amount or part from the date on which possession has been delivered

(5) *The buyer is bound—*

(a) to disclose to the seller any fact as to the

nature or extent of the seller's interest in the property of which the buyer is aware but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest,

(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs : provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the person entitled thereto;

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal money due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due

(6) *The buyer is entitled—*

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount, and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to

him of a suit to compel specific performance of the contract or to obtain a decree for its rescission

An omission to make such disclosures as are mentioned in paragraph (1), clause (a), and paragraph (5), clause (a) above, is fraudulent,

Where the purchaser discovers defects in the property before conveyance, he can rescind the contract or successfully oppose a suit for specific performance, but if the purchaser discovers material defects after the conveyance, he must make out a case of fraud in order to set aside a sale. In the case of an executed contract where property has been conveyed and the purchase-money paid, the purchaser has only a limited right to claim compensation from his vendor. He may sue when there is a breach of covenant of title or warranty or when the deed contains an express condition for compensation for any defects. But where his claim is based on misrepresentation pure and simple, such misrepresentation must be fraudulent.

*Marshalling by subsequent purchaser* If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or any other person who has for consideration acquired an interest in any of the properties. Suppose A is the owner of two properties X and Y, both of which are mortgaged to a certain person C. B purchases the property X. He will be entitled to insist that his vendor A should satisfy his mortgage-debt out of the property Y (which is still unsold) in the first instance, as far as possible. If after the property Y is exhausted, there still remains any balance of debt unsatisfied then and then only the

property X will be drawn upon.

*Discharge of incumbrances on sale.* Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court, or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court—

(1) in the case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property—of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient by means of the interest thereof, to keep down or otherwise provide for that charge, and

(2) in any other case of a capital sum charged on the property—of the amount sufficient to meet the incumbrance and any interest due thereon

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency except depreciation of investment not exceeding one-tenth of the original amount to be paid in, unless the court for special reasons (which it shall record) thinks fit to require a larger additional amount. Thereupon the court may, if it thinks fit, and after notice to the incumbrancer, unless the court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

## MORTGAGE

### Mortgage

A mortgage is the transfer of an interest in specific immoveable property for the purpose of secur-

ing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability

*Classes of mortgages* Mortgages are of six kinds (1) Simple mortgage, (2) Mortgage by conditional sale, (3) Usufructuary mortgage (4) English mortgage by deposit of title deeds, and (6) Anomalous mortgage

(1) *Simple mortgage* In the case of a simple mortgage, the mortgagor, without delivering possession of the mortgaged property, binds himself *personally* to pay the mortgage-money, and agrees, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of the sale to be applied in payment of the mortgage-money

(2) *Mortgage by conditional sale* In this class of mortgage the mortgagor ostensibly sells the mortgaged property to the mortgagee on condition - (i) that on default of the payment of the mortgage-money on a certain date the sale shall become *absolute*, or (ii) that on such payment being made the sale shall become void, or (iii) that on such payment being made the mortgagee shall re-transfer the mortgaged property to the mortgagor.

(3) *Usufructuary mortgage*: This is a form of mortgage in which the repayment of loan begins as soon as the mortgage is effected Here possession is given at once to the mortgagee who is to recover his loan and interest from the rents and profits accruing. This possession may be for a specific period during which the whole loan, or a specific portion of it, may, by special agreement, be taken to have been liquidated In the case of an usufructuary mortgage the mortgagee has no right to sue for a foreclosure or sale The mortgagor here is not personally liable to repay the



loan but the mortgagee is expected to look to the rents and profits to recoup his advance and interest.

(4) *English mortgage.* In an English mortgage the possession of the property generally remains with the mortgagor, whereas the real legal estate in the property passes to the mortgagee. The condition here is that on payment of the money *plus* interest the mortgaged property will be re-conveyed by the mortgagee to the mortgagor. If there is no express condition in an English mortgage as to a certain time for which the possession is to remain with the mortgagor then the mortgagor becomes a mere tenant at sufferance and is liable to be ejected by the mortgagee without any claim as to rent or interest due. English mortgages are most common in presidency towns and the courts in such towns have accorded to the parties the same rights as in English law.

(5) *Equitable mortgages.* Where a borrower borrows money by depositing title deeds of immovable property by way of security, the transaction is called an equitable mortgage or mortgage by deposit of title deeds. In an equitable mortgage the following conditions must be satisfied:— (a) there must be delivery of title deeds to the creditor, (b) there must be an intention to make the title deeds security for the loan; (c) the mortgage must be created in the towns of Calcutta, Bombay, Madras, Karachi, Rangoon, and in any other town which the Provincial Government concerned may, by notification in the official Gazette, specify in this behalf.

An equitable mortgage by deposit of title-deeds is recognised and enforceable by law in the Punjab, Delhi and Bangalore also.

(6) *Anomalous Mortgage:* Any mortgage which does not belong to any of the above classes is called an anomalous mortgage. The customary mortgages of India belong to this class,

### **Rights of the mortgagor .**

A mortgagor has the following rights in respect of the mortgaged property

(1) He can, at any time after the mortgage debt has become due, get back the mortgaged property provided he has paid or offered to pay the mortgagee the full amount of the mortgage debt. On such payment or offer of payment the mortgagee, if he is in possession must deliver the possession of the property to the mortgagor, and, if he has any document of the mortgagor, he must return the same. This right of the mortgagor to get back his property is known as the equity of redemption. This right can never be destroyed even if the mortgagor contracts to give away this right.

2. Where the mortgagor has deposited his title deeds to the mortgagee he can inspect and make copies of the deeds at his own expense.

3. Where the mortgagee effects improvements on the mortgaged property while the property is in his possession the mortgagor is always entitled to the improvement. But the mortgagee can charge the cost of such improvement on the mortgagor, provided the improvement was necessary for preserving the property and preventing waste.

4. Where the mortgagee in possession of the mortgaged property renews the lease of the property, the mortgagor, on redemption of the property, becomes entitled to the renewed lease.

5. Where the mortgagee in possession of the mortgaged property makes additions to the property, the mortgagor, on redemption, becomes entitled to such accretion.

### **Rights of the Mortgagee.**

The mortgagee has the following rights. —

(1) He can obtain a decree for foreclosure

against the mortgagor by which the mortgagor is deprived of his right of redemption and the mortgagee becomes the absolute owner of the property. Foreclosure is granted only in case of mortgage by conditional sale where the mortgagor fails or neglects to pay the debt long after it becomes due.

(2) He can sell the property if the principal money with interest is not paid by the mortgagor after it has become due and he can realise his dues from the proceeds of the sale. In case of usufructuary mortgage and mortgage by conditional sale this right of sale cannot be exercised.

(3) He can sue for the mortgage money where

(a) the mortgagor has bound himself personally to pay the money, as in a simple mortgage;

(b) the mortgaged property has become insufficient to pay for the debt without the fault of either the mortgagor or the mortgagee;

(c) the security, whether property or title deeds, has been partially or totally lost due to the mortgagor's fault.

(d) the mortgagee is entitled to possession of the mortgaged property, as in mortgage by conditional sale or English mortgage, and the mortgagor is not giving him undisturbed possession

(4) A mortgagee may spend such money as is necessary—

(i) for the preservation of the mortgaged property from destruction, forfeiture or sale; (ii) for supporting the mortgagor's title to the property, (iii) for making his own title thereto good against the mortgagor, and (iv) when the mortgaged property is a renewable leasehold, for the renewal of the lease; and the mortgagee may, in the absence of a contract to the contrary, add such money to the principal money at the rate of interest payable on the principal, and where no such rate is fixed, at the rate of *nine*

*per cent.* per annum The expenditure of money by the mortgagee under (1) or (11) above will not, however, be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property, and the premiums paid for any such insurance shall be added to the principal money with interest at the same rate as is payable on the principal money or, where no such rate is fixed, at the rate of nine per cent per annum. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two thirds of the amount that would be required in case of total destruction to reinstate the property insured. But the mortgagee is not authorized to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is authorized to insure as aforesaid.

### **Waste by mortgagor in possession**

A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate, but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act. A security is *insufficient* unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one half, the amount for the time being due on the mortgage.

### **Accession to mortgaged property.**

If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee in the absence of a contract to the contrary, shall, *for the pur-*

*pose of the security*, be entitled to such accession. Thus, if A mortgages a certain plot of building land to B, and afterwards erects a house on the plot, B is entitled to the house as well as the plot for the purposes of his security.

### Priority.

Where through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

### Charges.

Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions which apply to a simple mortgage shall, so far as may be, apply to such charge. A mortgage is thus a *transfer* of interest but a charge is not. The substantial distinction between a mortgage and a charge lies in the fact that while in the case of a mortgage there is the transfer of the interest in the immovable property, there is no such transfer of the interest in the case of a charge which merely secures payment of the money against specific property. A charge, however, is in the nature of a mortgage and the charge-holder is entitled to recover the amount due to him from whatever portion of the property he chooses.

## LANDLORD AND TENANT

### Definition of "lease"

A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be

rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

*Period of lease* In the absence of a contract or local law or usage to the contrary, a lease of immoveable property *for agricultural or manufacturing purposes* shall be deemed to be a *lease from year to year* terminable, on the part of either lessee, by six months' notice expiring with the end of a year of the tenancy, and a lease of immoveable property *for any other purpose* shall be deemed to be a *lease from month to month*, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy Every such notice must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property

*Leases how made :* A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession

Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument, shall be executed by both the lessor and the lessee

**Rights and liabilities of lessor and lessee.**

*In the absence of a contract or local usage to the contrary*, the lessor and the lessee of immoveable property, as against one another possess the rights and are subject to the liabilities as follows :-

(A) *Rights and liabilities of the lessor*

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware and which the latter could not with ordinary care discover

(b) The lessor is bound on the lessee's request to put him in possession of the property

(c) It shall be assumed that if the lessee pays the rent reserved by the lease and performs the contract binding on the lessee, he may hold the property during the time limited by the lease without interruption

(B) *Rights and liabilities of the Lessee*

(d) If during the continuance of the lease any accession is made to the property, such accession shall be deemed to be comprised in the lease.

(e) If by fire, tempest or flood, or violence of any army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury is occasioned by the wrongful act or default of the lessee, he is not entitled to avail himself of the benefit of this provision.

(f) If the lessor neglects to make, *within a reasonable time after notice*, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise

recover it from the lessor. In the absence of an express contract to that effect, the lessor is not necessarily bound to make any repairs whatever, and the lessee cannot call upon the lessor to repair the property. All that the lessee can do is to execute the repairs himself after giving reasonable notice to the lessor and secure the amount expended by him by deducting it from the rent or otherwise. And the tenant is entitled to deduct this sum even though there is a covenant in the lease to pay rent without deduction.

The tenant can deduct from the rent the expenses only on those repairs which the landlord was bound to execute, and if the landlord denies his liability to execute them, it is for the tenant to establish that the landlord was bound to execute them.

(g) If the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself and deduct it with interest from the rent, or otherwise recover it from the lessor.

(h) The Lessee may, *even after the determination of the lease* remove at any time *whilst he is in possession of the property leased but not afterwards* all things which he has attached to the earth provided he leaves the property in the state in which he received it.

(i) When a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them.

(j) The lessee may transfer absolutely or by way of mortgage or sub-lessee the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. To this rule there is an exception, namely, that a tenant having an



untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a court of wards, cannot assign his interest as such tenant, farmer or lessee.

(k) The lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest.

(l) The lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf.

(m) The lessee is bound to keep, and on the termination of the lease to restore the property in as good condition as it was in at the time when he was put in possession subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition, and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left

(n) If the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor.

(o) The lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings *belonging*

*to the lessor*, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto

(p) He must not, without the lessor's consent, erect on the property any permanent structure except for agricultural purposes

(q) On the determination of the lease' the lessee is bound to put the lessor into possession of the property

### **Rights of lessor's transferee**

If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so selects, be subject to the liabilities of the lessor as to the property or part transferred so long as he is the owner of it, but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him. 'But the transferee is not entitled to arrears of rent due before the transfer, and if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee. The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any court having jurisdiction to entertain a suit for the possession of the property leased

### **Duration of leases**

Where the time limited by a lease of immovable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. When no day of commencement is named,

the time so limited begins from the making of the lease.

When the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable the lessee, and not the lessor, shall have such option.

### **Determination of lease.**

A lease of immoveable property determines—

(a) by efflux of the time limited thereby :

(b) where such time is limited conditionally on the happening of some event- by the happening of such event

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right .

(e) by express surrender, that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them.

(f) by implied surrender.

(g) by forfeiture, that is to say, (1) in case lessee breaks an express condition which provides that on breach thereof the lessor may re-enter: or (2) in case the lessee renounces his character as such by setting up a title in a third person or by himself or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these

cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease :

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased duly given by one party to the other

*Waiver of forfeiture or of notice to quit* A forfeiture under clause (g) above is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting. The lessor must, of course, be aware that the forfeiture has been incurred. But where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

A notice under clause (h) above is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting. For instance, if A, the lessor, gives B, the lessee, notice to quit the property leased, and on the expiry of the notice B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice, the notice is waived.

*Relief against forfeiture for non-payment of rent.* Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment pass an order relieving the lessee against the forfeiture, and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

*Relief against forfeiture in certain other cases .*

Where a lease of immoveable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach, and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing as stated above shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased or to an express condition relating to forfeiture in case of non-pay-ment of rent

*Effect of surrender and forfeiture on under-leases :* The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease, but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor. The forfeiture of such a lease annuls all such under-leases except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture for non-payment of rent is granted.

*Effect of holding over .* If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent

from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified on page 451 *ante*.

## EXCHANGES

### Exchange

When two persons mutually transfer the ownership of one thing for the ownership of another neither thing or both things being money only, the transaction is called an "exchange"

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale

*Right of party deprived of thing received in exchange.* If any party to exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration

*Rights and liabilities of parties* Each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes

*Exchange of money* On the exchange of money, each party thereby warrants the genuineness of the money given by him.

## GIFTS

**"Gift" defined**

"Gift" is the transfer of certain existing moveable or immovable property made voluntarily and without consideration, by one person, called the *donor*, to another, called the *donee*, and accepted by or on behalf of the donee. Such acceptance may be made during the lifetime of the donor and while he is still capable of living. If the donee dies before acceptance, the gift is *void*

*Transfer how effected.* For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered. Under the Mohammadan law, the essentials of a gift are, a declaration of gift by the donor, an acceptance of the gift by the donee, and delivery of possession such as the subject of the gift is susceptible of

*Gift of existing and future property* A gift comprising both existing and future property is *void* as to the latter.

*Gift to several of whom one does not accept* A gift of a thing to two or more donees, of whom one does not accept it, is *void* as to the interest which he would have taken had he accepted

*When gift may be suspended or revoked:* The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is *void* wholly or in part, as the case may be. A gift may also be revoked in any of the cases (save want or failure of

consideration) in which, if it were a contract, it might be rescinded. Save as aforesaid, a gift cannot be revoked. The rights of transferees for consideration without notice are, however, not affected

A Hindu may revoke a gift made in wrath or excessive joy or through inadvertence or during disease, minority or madness, or under the influence of terror or under intoxication. A Mohammadan can revoke even after delivery of possession except in the following cases.—

(1) When the gift is made by a husband to his wife or by a wife to her husband, (2) When the donee is related to the donor within the prohibited degrees, (3) when the gift is *Sadaka* (i.e. made to a charity or for any religious purpose), (4) when the donee is dead, (5) when the thing given has passed out of the donee's possession by sale, gift or otherwise; (6) when the thing given is lost or destroyed, (7) when the thing given has increased in value, whatever be the cause of the increase, (8) when the thing given is so changed that it cannot be identified, as when wheat is converted into flour by grinding, (9) when the donor has received something in exchange for the gift. Except in these cases, a gift may be revoked at the mere will of the donor, whether he has or has not reserved to himself the power to revoke it, but the revocation must be by decree of Court.

## REGISTRATION OF DOCUMENTS

### **Documents of which registration is compulsory.**

The following documents must be registered

- (a) instruments of gift of immoveable property;
- (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or, extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in



immoveable property:

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferred or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish whether in present or in future any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property:

Authorities to adopt a son, executed after the first day of January 1872 and not conferred by a will, shall also be registered.

The Provincial Government may, by order published in the Official Gazette, *exempt* from registration any leases the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

Compulsory registration is not necessary in the case of—

(i) any composition deed; or

(ii) any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company consist in whole or in part of immoveable property; or

(iii) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immoveable property except in so far as it entitles the holder to the security afforded by a registered instrument

whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immoveable property or any interest therein to trustees upon trust for the benefit of the holders of such debenture, or

(iv) any endorsement upon or transfer of any debenture issued by any such Company, or

(v) any document not itself creating, declaring assigning, limiting, extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another document which will, when executed, create declare, assign, limit or extinguish any such right, title or interest, or

(vi) any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immoveable property other than that which is the subject-matter of the suit or proceeding, or

(vii) any grant of immoveable property by the Crown, or

(viii) any instrument of partition made by a Revenue-officer, or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883, or

(x) any order granting a loan under the Agriculturists Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue-officer.

**Documents of which registration is optional.**

Any of the following documents may be registered, namely :-

(a) instruments ( other than instruments of gift and wills ) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees, to or in immoveable property ,

(b) instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest ,

(c) leases of immoveable property for any term not exceeding one year, and leases exempted under section 17 of the Indian Registration Act as explained above;

(d) instruments (other than wills) which purport or operate to create, declare, assign, limit or extinguish any right, title or interest to or in moveable property ;

(e) wills ; and

(f) all other documents not required by section 17 of the Indian Registration Act, as explained above, to be registered.

**Effect of non-registration of documents required to be registered.**

No document of which registration is compulsory as explained in the previous pages shall;

(a) affect any immoveable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered,

But such a document shall, (except in the case of a decree or order), if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, whether such unregistered document be of the same nature as the registered document or not

## CHAPTER XII

# INSURANCE

### **Insurance.**

Insurance denotes a contract in the form of a policy between the insurer and the insured, whereby the former undertakes to indemnify the latter against any loss to the insured arising out of a contingency as mentioned in the policy, in exchange of a sum of money known as *premium* paid by the insured to the insurer. In the case of a life insurance policy, however, the insurer unlike in other types of insurance undertakes to pay to the insured a specified sum after a fixed period, or to his assignee on the happening of death of the insured. Though the latter type of insurance is strictly called "Assurance", while the former an "Insurance", in popular parlance the two terms are now synonymous.

*Indemnity* is the basis of all contracts of insurance, except contract of life or accident insurance. Thus the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this means that the assured, in case of loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. On the other hand, a contract of life insurance is not a contract to indemnify against loss like a fire or a marine policy, but is a contract to pay a definite sum in consideration of an annuity paid during life. Similarly, because a person cannot be indemnified for the loss of life an accident insurance policy is not a contract of indemnity. Similarly, Health Assurance and Burglary Assurance are not contracts of indemnity. In these cases the assured gets the stipulated amount on the happening

of the event insured against, irrespective of the actual pecuniary loss suffered

*Insurable interest* Again, as already noted (see page 22 *ante*) a contract of insurance is not a wager. A policy of insurance is, properly speaking, a contract to indemnify the insured in respect of some interest which he has contemplated it will be liable to. But in a wagering contract which relates to betting upon a future event, the parties to it do not contemplate of covering any risk or indemnifying any loss in respect of any interest or property, for the parties have no interest in the subject-matter of the contract apart from that created by the contract itself. It follows from this that no contract of insurance is valid unless the assured has some interest in the subject-matter at the time of the contract. Thus if A insures a ship or a house belonging to B and in which he has no interest whatsoever, the contract is void and the insurer is not bound to indemnify him in case of loss.

The interest which the assured possesses in the subject-matter in a contract of insurance is known as "insurable interest". In contracts of indemnity, *e.g.* fire or marine insurance insurable interest is certainly required by the terms of the contract. In insurance contracts, *e.g.* life or accident insurance, which are not contracts of indemnity, no interest is required by the terms of the contract. But even in these cases the law requires the assured to have some interest in the subject-matter, otherwise the contract would be void as a wager. Thus a man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him. It is now well settled that a man has an insurable interest in his own life and in that of his wife and children. Indeed any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life.

### Different types of insurance.

The most common and important forms of insurance contracts are: (1) Life Assurance (2) Marine Insurance; (3) Fire Insurance; (4) Accident Insurance, (5) Insurance against liability; (6) Guarantee Insurance (7) Health Insurance, (8) Motor Car Insurance; (9) Aviation Insurance.

#### Life Assurance.

Life assurance is that form of insurance by which the insurer undertakes, in consideration of certain premiums, whether a single one or spread over a period of time, to pay to the person for whose benefit the insurance is made a certain sum of money upon the death of the person whose life is insured, or after a certain period, whichever first occurs

Broadly speaking, life insurance policies are either an *Endowment* or a *Whole Life Policy*. There are other types, too. In an endowment policy, the insurer undertakes to pay to the insured a specified sum of money after a stated age, or to his assignee in case of his dying earlier. Under a whole life policy, the sum assured is payable only on the death of the insured. In both types, however, periods during which premiums are payable are laid down as a condition in the policy contract.

A policy may be effected upon the joint lives of two or more persons so that in the event of death of any of the persons insured, the policy money becomes payable to the survivors. This kind of policy is known as *Joint Lives Policy*. In the case of *Longest life assurance or insurance on last survivor* policy two or more lives are insured jointly but the sum insured becomes payable only on the death of the last survivor and not on the death of any one of the assured. Insurance policies of this kind are mainly of two types (1) *Temporary or short period insurance*, which is effected on joint lives for short periods, the sum insured being payable, on the death of the last survivor

only, if that occurs before the time specified, and (2) *Survivorship Insurance, or on one life against another*, which is effected on two lives jointly *e. g.*, those of A and B so that the sum insured becomes payable on the death of A if that should occur before the death of B, but not otherwise. If B dies before A the amount insured cannot be recovered

There are different kinds of policies issued in connection with children. They are called *Policies on Children's Lives*. A policy may be issued payable to a child after a stated period either for education or marriage. If this policy covers any risk, it is the risk of the guardian's life. If the guardian dies, no more premium is payable. If the child dies, either the insurance policy is transferred to another child, or all premiums are refunded with or without interest. Another type of children's insurance is that a policy is taken on the life of a child, which gives him the facility of continuing a policy at a much reduced rate of premium after his attaining maturity. This kind of insurance is becoming quite popular.

There are "*without-profits*" policies issued by almost all the Life Assurance companies and those who assure under this system, of course, are not entitled to any share in the profits of the company. Those who assure under the "*with-profits*" system get a share of the profits, but these shares are not the same in the case of all such policy-holders, as the profits of the company are not the same from the premiums paid by the different classes of policy-holders.

*Assignment.* A policy may be assigned on generally the following grounds, namely (a) friendship, (b) love and affection, (c) money, (d) agreement by which assignor benefits either by the assignee doing or abstaining from doing any act. Assignment must be in writing either on a separate piece of paper or on the back of the policy, and signed in either case by the transferor or assignor or by his duly authorised agent.



and attested by at least one witness, specifically setting forth the fact of transfer or assignment. The transfer or assignment is not to be operative as against an insurer and is not to confer upon the transferee or assignee, or his legal representative, any right to sue for the amount of such policy or the money secured thereby until a notice in writing of the transfer or assignment together with either the said endorsement or instrument itself or a copy thereof certified to be correct by both the transferor and transferee or their duly authorised agent has been delivered to the insurer. On a valid assignment the assignee becomes entitled to all the benefits under the contract and can sue the insurer under the contract in his own name.

A policy may be wholly assigned, or a mortgage or lien given upon it for a particular sum. Assignment is irrevocable. The Indian Insurance Act allows now *Nomination* i.e. a policy may be nominated in favour of any body, but such nomination can be cancelled any time by the nominator.

*Surrender Value* After an insurance policy remains in force for at least three years, in most cases, it generally acquires what is known as its surrender value. It is the amount which the company pays to the policy-holder in total discharge of his interest, in case he does not wish to continue the policy by payment of further instalments of premium. It is based on the reserve value of a policy, and is calculated at a certain percentage of the same, after allowing for (a) expenses, and (b) allowance for the increased rate of mortality. When a policy is surrendered, the surrender value is paid, and the contract of insurance lapses.

*Paid-up Policy*: In lieu of surrendering a policy, a policy-holder has the option of taking up a paid-up policy as well. That is to say, after a policy is paid up, no further premiums are payable, but the policy remains in force according to its original conditions except for a reduced sum, calculated according to the

practices of the company concerned. A paid-up policy is allowed after a policy has remained in force for two to three years, *i.e.* after it has acquired a surrender value.

*Automatic Non-Forfeiture* If the premium is not paid on a policy in due time, the policy lapses. It can, however, be received by paying arrear premiums according to varying rules of different companies. But if a policy remains sufficiently long in force, say 2 or 3 years, to acquire a surrender value, then certain advantages are allowed almost by all companies to the policy-holder in case of the policy lapsing. The policy may become automatically a paid-up one in the absence of any other expressed advice of the policy-holder. Some companies have the popular non-forfeiture clause under which if a policy lapses after acquiring a surrender value, the company will, in the absence of any contrary advice from the policy-holder automatically keep the policy in force by paying the premium which will be borrowed by the company from the surrender value of the policy. As soon as the premiums are paid up to the full amount of the surrender value, the policy lapses again, and the policy-holder can no longer claim any money on such a policy. The Indian Insurance Act now provides for a guaranteed surrender value for a life-policy on which all premiums for three consecutive years have been paid.

*Loan.* Life Assurance Companies as a rule grant loans to their policy-holders or their legal representatives on the security of the policies at a moderate rate of interest, though it is always higher than the bank rate for the time being. The loan value of the policy is usually 95 per cent of the surrender value acquired by the policy - the balance 5 per cent being retained by the company as a margin for arrears of interest.

*Claim and Reduction of premium.* A claim on a policy may arise either by death or survivorship accord-

ing to the terms of the contract. Claims on policies maturing during the life time of the assured, are paid at once on proof of age if not already proved, but claims on death are not paid before satisfactory evidence of death is produced and the legal title of the claimant to receive the proceeds of the policy is established. Proof of age is necessary in all cases. *Suicide* does not vitiate a policy unless it takes place, ordinarily, within one year from the date of the policy.

It is the common practice of the companies doing business in India to allow a reduction in the rate of premium if the assured leaves India to live in a country which is comparatively healthy. This is generally done when the life assured proceeds to Europe or to America north of 33° North Latitude. On return of the party to India he is again charged at the policy rate.

*Under-Average Lives.* Proposals are often received by life offices on lines which are considered by them to be below the average. Such proposals are treated in different ways by different companies. Some offices decline outright to accept such lines but others accept them by charging in different forms, an extra premium for the extra risk. Generally, this extra is charged in the form of a percentage on the face value of the policy, but there are offices which prefer a "loading" or "rating up" meaning adding a number of years to the age of the life assured according to the extra risk involved. Another system, called the "lien system," is followed by some other offices, under which the usual rate of premium is charged but the sum assured is reduced in the event of death within a stipulated period. This reduction diminishes year by year and disappears altogether at the end of that period, when the policy becomes entitled to the full amount of the assurance on its becoming a claim.

*Days of grace:* Life Assurance companies as a rule allow a certain time, generally 30 days in the case

of yearly, half-yearly, and quarterly payment and 15 days in monthly payment of premium, for payment of premium without any penalty after the due date of payment of same. These days are called the days of grace. The policy is not affected in any way, if payment is made within these days.

*Bonus* Profits which are distributed to policy holders are known as *Bonuses*. A bonus is declared at a certain per cent on the face value of the policy at each valuation, or it may be declared at so many rupees for the face value of the policy, e.g. 2 per cent. of the face value of the policy or Rs 20 per Rs 1,000 sum assured. The system of awarding a bonus varies in different companies.

Generally, a bonus vests in a policy and becomes payable with the policy on its becoming a claim either by maturity or death. It is not paid immediately after its declaration, nor does it become payable before the maturity of the policy. This is known as *Reversionary Bonus*. Companies may, however, allow in certain cases to take a bonus in cash, but such cash value of a bonus is highly discounted. A Bonus may also be utilised in certain cases to reduce the future rates of premium.

A policy becomes entitled to share in profits after it has been in force for some time. In this matter also the practices of companies vary. Some companies give bonus after a policy has remained in force at least for two or three years, while others give bonus from the very inception of a policy.

The rate of bonus which is declared is determined at each valuation. But a claim may occur in between two valuations, i.e. before another valuation becomes due. The bonus which is declared for this intervening period is called the *Interim Bonus*. It may be less than the usual rate of bonus. The usual practice is to give interim bonus at the same rate as declared in the previous valuation. When a policy

starts obtaining bonus from the very beginning of the policy, it is also in the nature of an interim bonus, because it is given before a valuation is made on the new policy.

When a bonus vests in a policy, it is accumulated over a number of years, and is paid at the end with the policy when it matures, then it is known as a *Simple Reversionary Bonus*. But it may be calculated in a different way. After one valuation has already been made, during the next valuation which declares a bonus, it may be calculated not on the face value of the policy alone, but then the face value of the policy includes also all previous bonus additions for calculating the new bonus. This is the system of *Compound Reversionary Bonus*.

*Payment of claims:* Where under a life insurance policy, the amount insured is payable only on the death of the assured, the amount may be recovered by the executor of the assured where he died leaving a will and otherwise by his administrator or legal representative. An administrator means a person to whom letters of administration have been granted by a competent court authorising him to administer the estate of a deceased person who has died without leaving a will. Under the Indian Succession Act all dues payable to a deceased dying intestate can be collected by his administrator alone. But S 212 of the Succession Act relieves a Hindu or a Mohammadan heir amongst others of the necessity of obtaining letters of administration to establish his claim to any part of the property of an intestate. It seems, therefore, that the heirs of a Hindu or Mohammadan assured can collect the insurance money falling due on his death without obtaining letters of administration. It also seems that heirs of assured can collect the insured amount without obtaining a succession certificate for under section 3 of the Indian Succession Act a succession certificate is only necessary to

collect debts due to the deceased at the time of his death. It follows that the debt must also be ascertained at the death of the deceased. It has been held that the amount insured payable on the death of an assured is neither ascertained nor is it a debt due to the deceased at the time of his death. But where an insurance policy stipulates that the money due under the policy will only be paid to the "assured or his executors, administrators or assignee", the money can only be recovered by the assured's executor where he dies leaving a will, or by his administrator where he dies intestate or by his assignee. Where the policy has been assigned by the assured the only person who can recover the amount insured is the assignee and the executor or administrator of the assured has no claim to the same. Where the amount insured becomes payable before the death of the assured at a specified time as in an endowment policy and the assured remains alive at such time the amount is to be paid to the assured unless he has assigned the policy to somebody else.

In cases of life assurance policies where the amount insured becomes payable on the death of the assured the liability of the insurer arises only on the death of the assured. On his death the person or persons entitled to the insurance money has to prefer a claim to the insurer usually in one of the claims forms of the insurer with sufficient proof of the death of the assured. The insurance company pays the money to the claimant on being satisfied of the death of the assured and of the rights of the claimant to the insurance money.

### **Marine Insurance.**

Marine insurance is a contract whereby one party, for a stipulated sum, undertakes to indemnify the other against losses arising from certain perils or sea risks, to which his ship, merchandise, or other interest, such as freight, may be exposed during a

certain voyage, or for a certain period of time. It is a contract of indemnity, that is, the insured cannot claim more than his actual loss. The insurance is generally effected with a number of individuals called "*underwriters*" This term arises from the fact that the persons who signify their willingness to take part in the risk as insurers subscribe their names to the policy, and state the sum for which they respectively agree to be liable. The best known association of underwriters is Lloyd's, who carry on business in Leadenhall Street, London

*Negotiation of policy by brokers.* The policy of marine insurance is generally negotiated by an insurance broker employed by the insured. As the broker is personally liable to the underwriters for the premium to be paid, his position is rather that of a middleman than of an agent. The practice is for the broker to prepare a brief memorandum of the terms of the intended policy, and the underwriters initial it for the amount each of them proposes to underwrite. This document is called the "slip". If the insurance is undertaken by companies, a separate slip is prepared for each company. It is from the slip that the policy is drawn up.

*Insurable Interest:* As in other kinds of insurance, the insurer must formerly have had an insurable interest in the subject-matter of the insurance at the time of his effecting the insurance. Every person has an insurable interest who is interested in a maritime adventure. A person is interested in a maritime adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof. The assured must be interested in the subject matter insured at the time of

the loss, though he need not be interested when the insurance is effected

*'Lost or not lost'* An insurance is sometimes effected when a ship is supposed to be on a voyage, and the parties are unaware whether it is still in existence. The words "lost or not lost" are inserted to cover such a case, and if it afterwards turns out that a loss had actually occurred before the time that the policy was effected, the insurance is valid. But if the insured was aware at the time of effecting the policy that a loss had taken place, he cannot recover. Conversely, if the underwriter knew that the voyage had been safely concluded he is bound to return the premium.

*Who has an insurable interest?* The persons who have an insurable interest such as is required by law include the shipowner, the owner of the goods carried, the mortgagee of the ship, the insurer of the ship or of the cargo, the person entitled to receive freight, and the master and the seamen for their wages. A person who advances money for a ship's necessities, otherwise than under bottomry bond, may insure to the extent of his advances. In each case the amount of insurance is limited to the extent of the various interests of the parties. A partial interest of any nature is insurable and the assured has an insurable interest in the charges of any insurance which he may effect. Alien enemies cannot insure, as this is contrary to public policy.

*Warranty.* What is a condition in an ordinary contract is known as a warranty in a case of an insurance contract. A marine insurance contract is based on warranties, expressed and implied. Certain conditions of the contract are clearly mentioned, while two conditions will be always deemed to hold good, whether they are mentioned or implied. In the first place, the vessel must be sea-worthy. That is to say, before the vessel starts either from the original port of



embarkation, or from any intermediate port, it must be certified by the port authorities as quite fit to undertake the voyage. Secondly, the vessel must be used for a lawful purpose. No insurance policy is deemed to be valid, if the vessel is used for smuggled goods, or any other unlawful objects

*Types of Policies.* Among the various types of marine insurance policies, the following are important: (1) In a *voyage policy*, the object is insured for a specified voyage, while in that of a (2) *time policy* it is for a specified period. (3) A *mixed policy* is a combination of the above two, viz. the object is insured for both a specified period as well as voyage (4) A *valued policy* is one, where the value of the subject-matter of insurance is mentioned in the policy while in an (5) *Unvalued or open policy*, the value is not mentioned (6) In a *Floating policy*, no mention is made of any particular vessel, it being stated to apply to any particular steamer to be declared for a specified voyage. *Open cover* is another form of insurance on goods. This type of insurance contract is obligatory on the insurer in honour only and not legally. the insurer in such a case undertakes to issue regular policies to the insured for an amount not exceeding a specified sum by every vessel in which the insured is interested, the vessel sailing before a fixed date Premiums are fixed beforehand or adjusted later. (8) *Construction Builders' Risks Policies* are issued for a period exceeding a year and cover risks of vessels during their period of construction. (9) *Fleet Policies* are issued in one policy covering the whole fleet of liners belonging to one owner. (10) *Composite Policies* mean one policy which has been subscribed for by more than one insurance company, but the liability of each insurer remains separate and distinct (11) *Port Risk Policy* is issued to cover the risk of a vessel while it is in a port during a stated period

*Marine Insurance Policy:* A marine insurance policy is always prepared to suit each and every individual case. and therefore there may be various clauses

in marine insurance policies. Some of these clauses are more or less common to all policies, while others are attached to policies in special cases. A reference has already been made to a clause 'lost or not lost'. The other important clauses are

(i) *Sue and Labour clause* This clause means that the insured or his authorised agents are entitled to take all steps for the preservation of the subject-matter of insurance in case of danger. The insurer agrees further under this clause to pay to the assured his share of expenses reasonably incurred for such a purpose.

(ii) *Permission to Touch Stay*: This clause gives permission to the vessel to touch and stay in regular and due ports. No unreasonable deviation away from the usual course of navigation is allowed except in emergencies *i.e.* to save the vessel itself, or to rescue the lives of passengers.

(iii) *F. G. A.* This means the Foreign General Average clause which states how average settlement under General Average is to be settled in a foreign country.

(iv) *Running Down clause* This clause states the arrangement between parties to the insurance, providing for how much the insurer will pay in case of a collision, which is caused by the wrong act of the insured vessel and in which the owner of the same vessel is made to contribute towards loss and damage as assessed by any Law Court.

*F.C & S.*: This means the Free of Capture and Seizure clause, which states that there is no liability of underwriters in case the ship sustains any damage or loss owing to enemy's seizure or attempt to take the vessel as a prize of war. This risk may be covered by the insured by paying an extra premium known as War Risk premium.

(v) *Continuation clause* It sometimes happens

that a time policy expires even when the vessel is at sea or in a peril insured against. In such a case the continuation clause provides, "she shall, provided previous notice be given to the underwriters, be held covered at a pro rata monthly premium to her port of destination.

(vii) "*Waiver*" clause: This clause declares that no act of the insurer or the insured in recovering, saving or preserving the subject matter of insurance shall be considered as a waiver, or acceptance of abandonment. Hence, both the insurer as well as the insured can take all steps to minimise the loss of the object insured, without prejudice to their rights under the policy.

*Salvage* is compensation paid to any person, who rescues a vessel, its part, cargo, or any other thing from shipwreck or danger.

*Losses in Marine Insurance*: Losses incurred by perils insured against may be of various kinds. A *total* loss occurs when the subject-matter of insurance is totally lost, whereas a *constructive* total loss occurs when the object of insurance though not really lost, yet may be considered to be so, for all practical purposes from the standpoint of the insured.

Any partial loss in marine insurance is termed as '*Average*'. *Average* is *General*, when the partial loss is to be borne by all interested in the vessel, proportionately. An example of general average is when loss is incurred by the stranding of a vessel, or any jettison takes place. (*Jettison* means that the captain or master of a vessel throws overboard a part of the ship's cargo for the general safety of the vessel itself). In case of jettison, the loss incurred is a general average, and should be paid proportionately, by all underwriters interested in the vessel. As distinct from a general average we have got a "particular" average, which refers to a partial loss, incurred by any object insured by itself alone against a marine peril *e. g.*,

tins of biscuits are sent by a vessel; but of those a few may get damaged by seawater. There we have an example of particular average, *i. e.* loss special to a cargo and it must be borne by it alone.

In order to safeguard interests of insurance underwriters, very often marine insurance policies carry the F.P.A. clause, *viz.*, the free of particular average clause states that no liability attaches to the insurer for any particular loss to a cargo, unless the vessel be stranded. By itself the clause does not give adequate protection to the insured, and so, generally, the F.P.A. clause is modified by saying that no particular average will be compensated for unless its value exceeds a certain percentage of the sum assured. This is done to stop flimsy claims of negligible amounts. The Memorandum attached to a policy generally states in details the liability of the insurer in Averages of all kinds.

*Liability of the insurer* Where the assured has incurred "general average expenditure" he cannot recover the whole of such expenditure from his insurer. The insurer is liable to indemnify him only to the extent of his contribution. Thus a shipowner paying money to pirates to save the ship and cargo cannot recover the whole amount from his insurer. He is entitled to get only that amount which will be adjusted as his contribution after taking into account the contribution which the cargo owners and other interested parties are liable to make. He will have to look for the residue to such other parties. But in the case of "general average sacrifice" the assured may recover from the insurer the entire amount of the loss the insurer being subrogated to the rights of the assured in respect of his right of contribution from the other parties. Thus in the case of goods being thrown overboard or a hole being cut in the ship, the owner of the goods in one case and the shipowner in the other can recover the full amount of the loss from the insurer.

Subject to any express provision in the policy, when the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover the amount of his contribution from the insurer. Thus if goods are thrown overboard to lighten the ship, the shipowner who has to pay a general average contribution can recover the amount from his insurer.

*Right of the insurer:* The following are the rights or the insurer in a marine policy

(a) He is entitled to payment of the premium stipulated in the policy.

(b) He is entitled to avoid the contract if there is any fraud, misrepresentation, or non-disclosure of material facts or any unauthorised alteration of any material term of the policy without his consent, or any breach of warranty

(c) He is subrogated to the rights of the assured and he is entitled to all the rights and remedies of the assured, on his indemnifying the assured, in the following cases—

(1) Where there is a total loss, either actual or constructive, the assured having abandoned the property insured, the insurer is entitled to all the materials salvaged or to the property if and when restored. He is also entitled to all claims in damages which the assured may have against third parties in respect of negligence or tort due to which the total loss is caused. Thus if a ship insured is totally lost as a result of a collision with another ship caused by the negligence of the owner of the other ship or his servants, the owner of the insured ship has a claim for damages against the latter shipowner. If he is indemnified by his insurer the insurer is entitled to the damages which he may recover against the latter shipowner

(2) Where a general average loss occurs as a result of general average sacrifice the insurer of the party on whom the loss falls indemnifies for the entire

loss. But the insurer is subrogated to the right of the assured and he is entitled to general average contribution which the other parties interested in the adventure are liable to make.

### Fire Insurance

The contract of fire insurance, unlike that of life insurance, is one of indemnity, the insured undertaking, in consideration of the premium paid, to make good any loss or damage caused by fire during a specified period. The maximum amount which can be claimed is fixed by the parties to the contract, but this amount is not the measure of the loss. The loss can be ascertained only after a fire has occurred. The contract is usually embodied in a policy which contains all terms and conditions on which the insurance is effected. But the contract may be concluded by the acceptance of the proposal by the insurer before any premium is paid or policy issued. When such a contract is concluded the insurer may be compelled to issue a policy even if a fire has already taken place.

*Formation of contract* A contract of fire insurance is usually concluded like this. The assured, to begin with, fills up his proposal in a printed form supplied by an agent of the insurer. On making the proposal the assured sends the premium or some part of it to the insurer who thereupon issues what is known as a deposit receipt or interim protection note often called a *cover-note* whereby he undertakes to keep the assured indemnified for a limited period until the acceptance or rejection of the proposal of the assured. The *cover-note* is evidence of the proposal and also constitutes an undertaking that, pending the acceptance or refusal of the proposal, the property of the assured would remain insured subject to the terms and conditions of the insurer. If any fire takes place during the currency of the *cover-note*, the insurer must cover the loss unless he has previously declined the proposal. Where the insurer accepts the proposal, a regular

policy is issued to the assured containing all the terms and conditions subject to which the policy is held.

*Insurable interest.* As in life insurance, the insured person must have an insurable interest in the subject-matter of the contract. An owner of course has interest in the property owned by him. The following persons have an insurable interest in the following properties so as to enable them to effect fire insurance thereon. (a) Vendor of goods in respect of which the property and risk have not passed. (b) The mortgagor and mortgagee of any property, moveable or immovable. (c) The trustee and beneficiary of any property. (d) The lessor and lessee of any property. (e) The bailor or bailee of any property.

*Material facts must be disclosed.* In a contract of a fire insurance also the assured must disclose all material facts, *i. e.*, facts which determine the question of premium and risk, within his knowledge. If he fails to do so the insurer may avoid the contract. The important material facts are (i) whether there are other insurances on the same property; (ii) whether other insurers have refused insurance on the same property, (iii) whether there occurred previous fires on the same premises or in the neighbourhood; (iv) of what materials, the outer walls, roof, etc. of the house are made of, (e) for what purpose the building or premises are used, (f) whether the building is occupied or not.

In the written proposal which the assured signs are contained statements and answers to questions *i. e.* the description of the property, or the nature of neighbouring risks, or whether the assured has had a fire claim against any office. Such statements and answers are called *representations* and if any representation material to the risk is not substantially true the insurer is entitled to avoid the contract. If such statements and answers are embodied in the policy itself they

amount to *warranties*. It is a condition precedent of the insurer's liability that the warranties must be strictly and literally true whether they are material to the risk or not.

*Form of Policies* A fire policy may be a (1) *special* policy, whereby the insurer is obliged to indemnify the assured for a stated sum, irrespective of the fact, whether the subject-matter is insured for its full value or not (2) It is called an *average policy*, when it is attached with an *average clause*. Under it, the insurer is liable to indemnify the assured to a value equal to a ratio which the insured value of the subject-matter of insurance bears to its total actual value. The average clause safeguards the insurer against any under insurance on the part of the assured (3) In a *valued policy* the insurer is liable to pay the full stated value. It is popular in case of curios and precious relics which cannot be replaced. (4) A floating policy covers the risks of different properties, scattered over several localities. Floating policies which are largely used for mercantile risks cover fluctuating risks held, for example, in several warehouses. They contain also a second condition of Average, the object of which is to relieve the floating policy from liability to contribute to a loss which is also covered under a policy of more limited range, unless the latter insurance is insufficient to pay the whole loss in which case the floater applies to the balance of the loss, subject to average. Floating policies cover stock floating over the whole of a manufacturer's premises, but instead of the highest rate of premium of any one portion of the risk being applied to the whole, the average rate is adjusted and that rate charged for the entire risk.

An "*Excess*" Fire Policy is designed to meet the requirements of traders whose stock in hand tends to vary in quantity and in value from time to time. The risks covered are the same as those covered by the ordinary fire policy, but insurance need not be main-



tained for the maximum amount of stock which may be at risk at any time. The "Excess" policy tends to cover fluctuations in value at an average cost, the normal amount at risk being covered by an ordinary fire policy on a specific sum insured. The difficulty which arises under an "Excess" policy is that the holder of such a policy, who has a standard policy covering the main risk, may be penalised by the operation of the condition in the standard policy which limits the contribution of the standard policy to a rateable proportion only of the loss. Hence "Express" policies have been generally substituted by "*Declaration*" Fire Policies, which are effected for a sum calculated to cover the maximum amount which may be at risk at any one time during the continuation of the policy, the premium being estimated by periodical declarations. "*Adjustable*" Fire Policies are those in which the assured notifies the Company of his requirements on each occasion that the value of the insured stock undergoes appreciable increase or decrease, *i.e.* before the risk is run, whereas in "Declaration" policies the insured declares the value of the stock at the end of a stipulated period. "Sprinkler Leakage" Policies are issued to indemnify the assured against loss or damage caused to buildings or their contents or both by accidental leakage of water from an installation of sprinklers, which automatically act on the raising of the temperature by fire, and spray water uniformly over the affected part of the premises.

*Assignment*: A contract of fire insurance is a personal contract with the assured, and is not a contract passing with the property insured. Therefore, on sale or transfer of the property, the transferee acquires no interest in the policy, unless the policy is expressly or impliedly assigned to him.

A Fire Insurance Policy generally contains the following claims.

"This policy ceases to be in force as to any of

the property hereby insured, which shall pass from the insured to any other person otherwise than by will or operation of law, unless notice thereof be given to the company and the subsistence of the insurance in favour of such other person be declared by a memorandum indorsed thereon by or on behalf of the company."

In the absence of such a clause there seems to be no reason to hold that an assignment to be valid must be with the consent of the insurer. In the absence of any express provision prohibiting assignment a fire insurance policy may be assigned by writing either by indorsement on the policy or in any other customary manner. But the assured must have some insurable interest at the time of assignment and if he parts with or loses his interest in the property insured, an assignment thereafter by him will be of no effect.

*Making and settlement of claim* In a fire policy the assured is entitled to recover any loss or damage by fire to the property insured. A loss by fire means loss by ignition and does not include loss or damage by heating where nothing has caught fire. The cause of fire is, however, immaterial and it is no defence for the insurer that the fire would not have been caused but for the negligence of the assured or his servants. But the assured cannot recover any loss caused by his own wilful mis-conduct *e g* when he wilfully sets fire to the property insured.

When a claim arises in a fire insurance, it should be communicated immediately to the insurance company. The insured must make a claim stating the extent of the loss of the property and giving also the market value of the property with supporting documents, if possible, within fifteen days of the fire having broken out. The company may require an affidavit in support of the statement of the insured, if necessary. The company may send its agent or representative to visit the place of fire, who is entitled to enter the premises, destroyed or damaged by fire.

As adjustments in fire claims are very complicated, generally experts known as Assessors are appointed in order to settle fire claims. A fire policy often contains an arbitration clause, which provides for settlement of disputes between insured and insurer by means of arbitration. The insured may appoint one arbitrator, the insurer another. If the two arbitrators differ, then it is provided that they may appoint an Umpire, whose decision is final and obligatory upon the parties concerned.

*Amount recoverable.* In marine insurance, as already noticed, the insurer is liable to pay the whole of the amount insured in case of total loss and a proportion only of the loss as the insured amount bears to the value of the property in case of partial loss. But in fire insurance the insurer is liable to pay for the actual loss up to the amount insured whether the loss be total or partial in the absence of any express provision to the contrary. Thus if the value of the property insured be Rs 10,000/- and the amount insured is Rs 1,000/- and partial loss occurs to the extent of 10 per cent. the fire insurance company will be liable to pay the entire amount of the loss namely Rs 1,000/- whereas if it were a marine insurance, the insurer would be liable to pay only 10 per cent of Rs 1,000/- i.e. Rs 100/-.

A fire insurance company may, however, limit its liability to pay the whole of the amount of the loss where it is partial by inserting what is known as the "average clause" in the policy. The effect of the average clause is that if at the date of loss the property insured is of greater value than the sum insured, then the assured shall be considered his own insurer for the difference and shall bear a rateable share of the loss accordingly and the insurer shall be liable for a proportion only of the loss as the insured amount bears to the value of the property. Thus if in the above illustration the fire policy were subject to average, the fire insurance company would have been liable to the

extent of Rs 100/- only and not Rs 1,000/-

### **Motor Car Insurance.**

There are usually four kinds of *Motor Car Insurance* policies, namely (a) private motor cars, (b) commercial vehicles, (c) motor traders's vehicles, and (d) motor-cycles. Motor insurance policy covers risks of the physical body of the car as well as third party risk. Third party risks in Accident insurance mean that the assured is insured against any loss, injury or damage to third party caused by his negligence or his failing to exercise due care.

When all risks are covered premiums tend to be higher than that meant to cover one or a lesser number of risks.

*Third party insurance* It is now an offence to use any motor vehicle upon a highway unless a policy of insurance is in force against so-called "third-party risks". The object of this is to provide for the common case of an impecunious driver causing serious injury to another person.

With effect from 1st July, 1946, no person can now use except as a passenger or cause or allow any other person to use a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of Chapter VIII of the Motor Vehicles Act, 1939.

The following are the *requirements* of Chapter VIII of the Motor Vehicles Act, 1939, in this respect.

(1) The policy of insurance must be a policy which (a) is issued by a person who is an authorised insurer, and (b) insures the person or classes of person specified in the policy to the extent specified below against any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the

vehicle in a public place.

(ii) A policy, however, *shall not be required* (i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment, or (ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises, or (iii) to cover any contractual liability.

A Provincial Government may, however, prescribe that a policy of insurance shall in order to comply with the requirements of this Chapter cover any liability arising under the provisions of the Workmen's Compensation Act, 1923, in respect of the death of or bodily injury to any paid employee engaged in driving or otherwise in attendance on or being carried in a motor vehicle.

(iii) Subject to above, a policy of insurance *must* cover any liability incurred in respect of any one accident up to the following limits, namely:-

(a) where the vehicle is a vehicle used or adopted to be used for the carriage of goods, a limit of *twenty thousand rupees*,

(b) where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, in respect of persons other than passengers carried for hire or reward, a limit of *twenty thousand rupees*; and in respect of passengers a limit of *twenty thousand rupees*, in all and *four thousand rupees* in respect of an individual passenger, if the vehicle is registered to carry

not more than six passengers excluding the driver or two thousand rupees in respect of an individual passenger, if the vehicle is registered to carry more than six passengers excluding the driver;

(c) Where the vehicle is a vehicle of any other class, the amount of the liability incurred

*Exemptions* Compulsory insurance is not required in respect of any vehicle owned by or on behalf of the Central Government or a Provincial Government, or a local authority notified in this behalf by the Provincial Government, or a State-owned railway, at any time when the vehicle is driven by a servant of the owner in the course of his employment, or is otherwise subject to the control of the owner

A person driving a motor vehicle merely as a paid employee, while there is in force in relation to the use of the vehicle no such policy as is required as explained above, shall not be deemed to act in contravention of the above provisions of law unless he knows or has reason to believe that there is no such policy in force

*Certificate of insurance or cover note* A policy shall be of no effect for the above purposes unless and until there is issued by the insurer in favour of the person by whom the policy is effected a *certificate of insurance* or a *cover note* in the prescribed form and containing the prescribed particulars of any conditions subject to which the policy is issued and of any other prescribed matter. Forms of certificate of insurance and cover note are prescribed by rules

On loss or destruction or defacement or mutilation of a certificate of insurance or cover note, the policy holder, on lodging a declaration with the insurer, can get another issued in lieu thereof on payment of a fee of Rs 3

*Fee for production of information* The fee to be paid in return for the production of information by

a Registering Authority or the officer in charge of a police station under section 109 of the Motor Vehicles Act, 1939, is Re. 1

*Penalty*: Whoever drives a motor vehicle or causes or allows a motor vehicle to be drawn in contravention of the above provisions relating to compulsory insurance, is punishable with imprisonment which may extend to three months, or with fine which may extend to five hundred rupees, or with both

### **Burglary Insurance.**

It is now possible to cover the contents of private dwelling-houses against burglary, house breaking and larceny by means of insurance policies. The contents of business premises are covered only against burglary and house-breaking, as theft by customers and employees is too great a risk to be covered. Other forms of burglary policies tend to cover "all risks" insurance on jewellery, furs, etc. "baggage" insurance on luggage in transit, insurance on cash and securities in transit, etc

### **Personal Accident Insurance.**

In a contract of accident insurance the insurer usually undertakes to pay a certain sum to the representatives of the assured in case of his death by accident, and a certain smaller sum to the assured in case of disablement, total or partial, and to pay a certain weekly allowance to the assured during the period he is prevented from attending his normal vocation. Accident insurance is, therefore, not a contract of indemnity inasmuch as it provides for the payment of a specified sum on the happening of a certain event. The insurance company cannot, therefore, claim any benefit which the assured may have against a third party causing the accident by way of subrogation.

*Accident*. Accident generally denotes an unlooked for mishap or an untoward event which is not expected or designed *e. g.* a train disaster or an aero-

lane crash or a motor car collision or an injury received by a workman while tending a machine. But death or injury by ordinary or common maladies like sunstroke or pneumonia is not to be regarded as accident. The work necessarily involves some violence, casualty or vis-major and implies something fortuitous.

### **Insurance against liability to third persons**

Under a policy of insurance against liability to third parties, the insurer undertakes to indemnify the assured against any specified liability which he may incur in relation to a third party *e.g.* where an employer insures against his liability to pay compensation to his workmen under the Workmen's Compensation Act, 1923, in case they sustain injury by accident in course of employment or where a solicitor insures against any loss arising from claims which might be made against him by reason of any neglect, omission or error committed by him in the conduct of any business connected with his professional work. In case of such a policy the insurers are only liable for any liability which arises as a result of some act of the assured which is not illegal.

### **Guarantee Insurance**

Under a policy of guarantee insurance the insurer undertakes to indemnify the assured for loss caused due to the default, negligence, fraud or misconduct of a third party which constitutes the risk. There are mainly three kinds of guarantee insurance, namely, (1) Fidelity Insurance, (2) Commercial Insurance and (3) Judicial Insurance.

(1) *Fidelity Insurance*—Under this kind of insurance the insurer agrees to indemnify the assured, in consideration of certain payments known as premium to the extent of the amount insured against loss arising through the fraud, dishonesty, or unfaithfulness of third party (usually the servant or agent of the assured) standing in a fiduciary relationship (*i.e.*, one



of faith and trust) to the assured.

The insurance is generally effected for a fixed period and the amount of premium is generally payable in a certain number of annual instalments.

(2) *Commercial Insurance*—Under this kind of insurance the insurer agrees to indemnify the assured, in consideration of a certain premium, to the extent of the amount insured against loss arising out of the breach of contract on the part of a third party who stands in a contractual and not fiduciary relationship to the assured. Commercial insurance is of three types, namely contract, credit and title insurances

(i) *Contract Insurance*—It is that branch of commercial insurance whereby the insurer, in consideration of a certain premium, agrees to indemnify the assured to the extent of the sum insured for loss or damage arising out of the breach of contract by third parties in respect of contracts entered into by such third parties with the assured. A policy of contract insurance is commonly known as an indemnity bond and is issued to cover the obligations of person like contractors, common carriers, warehousemen, apprentices and bankers.

(ii) *Credit Insurance*—It is a kind of commercial insurance whereby the insurer, in consideration of an agreed premium, agrees to indemnify the assured to the extent of the sum specified for loss caused to the assured due to the insolvency of third parties to whom the assured has sold goods or merchandise on credit. It is also called 'solvency insurance' or 'insurance of debts'.

(iii) *Title Insurance*—It is an agreement whereby the insurer, in consideration of an agreed premium, agrees to indemnify the assured in a specified amount against loss which may be incurred due to defect in title to real estate in which the assured has an interest either as purchaser or lessee or otherwise.

(3) *Judicial Insurance* Under this kind of insurance, the insurer agrees in consideration of certain payments known as premium, to indemnify the assured to the extent of the amount insured, for loss caused through the misconduct or negligence of a court officer *e.g.* a receiver or through the failure of a litigant or a party to any judicial proceeding to carry out his obligations and under-taking Administration bonds furnished by executor, administrators, guardians, trustees and receivers are instances of judicial insurance

### **Insurance Act, 1938**

Prior to 1912 there was no Act in India applicable to insurance companies exclusively and Insurance Companies were governed by the Indian Companies Act, 1882 In 1912 two Acts were passed namely, the Indian Life Insurance Companies Act, 1912 and the Provident Insurance Societies Act, 1912 The former applied only to life insurance companies established within or without British India, with the exception of companies carrying on business in the United Kingdom in accordance with the English Assurance Companies Act, 1909 The latter applied only to provident societies in British India. With the growth of other forms of insurance in India after the war and as a result of the insistent demand of public opinion in India for the control of foreign companies mainly British which were exempt from the provisions of the two Acts, it was felt that the former Act was inadequate to meet the necessities of the situation The Insurance Act, 1938 was, therefore, passed to remedy the situation It applies to all insurance companies, life, marine, fire or provident The Life Insurance Act, 1912 and the Provident Insurance societies Act, 1912 are also repealed by this Act, It aims to prevent the formation and continuation of mushroom companies and to enforce business being carried on sound principles and has made strict provisions in respect of registration, compulsory deposits, investments, inspection, and commission payable to agents, for the

purpose. But the Insurance Act, 1938 does not affect the liability of insurance companies to comply with the provisions of the Indian Companies Act, 1913 in matters not otherwise specifically provided for by this Act. Insurance companies are, therefore, governed by the Insurance Act, 1938 as well as by the Companies Act, 1913, in matters not covered by the former Act

## CHAPTER XIII

# LIMITATION AND STAMPS

### Limitation.

The Indian Limitation Act of 1908 lays down the various periods of limitation within which a suit, appeal, or application must be made otherwise it will be dismissed. The *general rules* applicable are as follows

(1) When a period expires on a day on which the court is closed the appeal or application may be preferred or made on the day on which the court reopens.

(ii) In cases of minors, insane persons, idiots etc., during whose incapacity the period of limitation is to be reckoned, the usual period does not begin to run until after the disability has ceased. If this disability does not cease till death, the legal representatives of these incapacitated parties may institute the suit, application, etc., within the same period after the death as would otherwise have been allowed from the time so prescribed. In case of the disability of the representatives themselves the same rules shall apply.

(iii) Where one of several persons, say a partnership firm, *who is jointly entitled to institute suits*, etc., happens to be incapacitated and if a discharge can be given without the concurrence of such a person time will run against them all; but if no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability of the person in question has ceased.

(iv) The above rule applies only to disabilities which existed at the time limitation began to run. If, however, the limitation period has already begun

to run, no subsequent disability or inability to sue stops it. The only *exception* to the rule is where a creditor is granted letters of administration to the estate of his debtor, for in this case the running of time prescribed by limitation is suspended while the administration continues. This does not apply to an executor because in the former case the suspension to the period was brought about through an act of law, whereas the appointment of an executor is a voluntary act on the part of the testator, and according to the English Common law, where a testator appoints his debtor executor, he is presumed to have forgiven the debt inasmuch as he was the only person who could collect it. The rule of equity which however, prevails both in England and India now is that as soon as the executor debtor accepts office he is presumed to have at once paid himself, in his capacity as an executor, and so holds that amount in trust on behalf of the estate.

(v) *Foreign contracts*: Contracts entered into in foreign countries of which suits are instituted in British India are subject to the rules of limitation contained in the Indian Act. If, however, both the parties are domiciled in a foreign country during the whole of the period of limitation, in accordance with the rule of foreign country where it was entered into, which has extinguished the contract, it would be a good defence.

(vi) *Computation of the period*: In computing the period of limitation, the time from which such a period is to be reckoned is to be excluded. In other words, it is to be counted from midnight of the day from which such period is to be reckoned. In the case of an appeal from a suit, the time requisite for obtaining a copy of the judgment on which the appeal is to be founded is to be excluded. In case of application to set aside an award, the time requisite for obtaining a copy of the award is to be excluded. In computing the period of limitation, the time during

which the defendant has been absent from British India and from the territories beyond British India under the administration of the Government shall be excluded. The rule will not apply where the defendant though absent personally, has an agent in British India duly constituted. If, however, the plaintiff has been prosecuting with due diligence and in good faith, another civil proceeding against the defendant, founded upon the same cause of action, which the court, from defect of jurisdiction or other cause of a like nature, is unable to entertain, the time spent shall be excluded.

(vii) Where a person has been kept from instituting a suit or application, by want of knowledge arising through fraud, or the document necessary to establish such right has been fraudulently concealed from him, as against the person guilty of the fraud or accessory to it, or claiming through him otherwise than in good faith and for valuable consideration, the time is to be computed from the moment when the fraud first became known to the person concerned when the first had the means of producing or compelling production of the concealed document. This rule operates only against the person guilty of the fraud or against those claiming under such persons. If this fraud is committed by an agent or servant of the party, it should be proved that it was committed for the general or special benefit of the principal.

(viii) *Acknowledgment in writing.* Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

Where the writing containing the acknowledg-

ment is undated, oral evidence may be given of the time when it was signed.

The acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time of payment, delivery, performance or enjoyment has not yet come, or is accompanied by refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than the person entitled to the property or right

The signature may be of the person himself or his duly authorised agent.

(ix) *Part payment or payment of interest.* Where a part payment of the principal debt, or interest on a legacy is made, before the expiration of the prescribed period, by the debtor or his duly authorized agent, a fresh period of limitation shall be computed from the time when the payment was made. In the case of part payment, the fact that the payment was made must appear in the handwriting of the person making it or be signed by him. The debt would include money payable under a decree or order of court. The payment, of course, should have been made to the creditor or his duly authorized agent and not to a stranger, unless the latter payment is made at the request of the creditor.

*Table showing the statutory time limit in certain cases*

Description of suit	Period of limitation	Time from which period begins to run
For the wages of a household servant, artisan or labourer not provided	One year	When the wages accrue due.
For the price of food or drink sold by the keeper of a hotel, tavern or lodging house	"	When the food or drink is delivered.
For the price of lodging	"	When the price becomes payable
To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for	"	The date of the act or order
Against Government for compensation for land acquired for public purposes	"	The date of determining the amount of the compensation
For compensation for inducing a person to break a contract with the plaintiff	"	The date of the breach
Against a carrier for compensation for losing or injuring goods	"	When the loss or injury occurs
Against a carrier for compensation for non-delivery of or delay in delivering, goods	"	When the goods ought to be delivered
For the hire of animals, vehicles, boats or household furniture.	Three years	When the hire becomes payable.



Description of suit	Period of limitation.	Time from which period begins to run.
For the balance of money advanced in payment of goods to be delivered.	Three years	When the goods ought to be delivered.
For the price of goods sold and delivered, where no fixed period of credit is agreed upon.	"	The date of the delivery of the goods
For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit	"	When the period of credit expires
For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given	"	When the period of the proposed bill elapses.
For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment	"	When the work is done
For money payable for money lent.	"	When the loan is made.
Like suit when the lender has given a cheque for the money.	"	When the cheque is paid.
For money lent under an agreement that it shall be payable on demand.	"	When the loan is made.

Description of suit	Period of limitation	Time from which period begins to run
For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable	Three years	When the demand is made
For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency	"	When the time specified arrives or the contingency happens
On a bill of exchange or promissory note payable at a fixed time after date.	"	When the bill or note falls due
On a bill of exchange payable at sight, or after sight but not at a fixed time	"	When the bill is presented.
On a bill of exchange accepted payable at a particular place	"	When the bill is presented at that place
On a bill of exchange or promissory note payable at a fixed time after sight or after demand	"	When the fixed time expires.
On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue	"	The date of the bill or note.
On a promissory note or bond payable by instalments	"	The expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment

Description of suit	Period of limitation	Time from which period begins to run.
On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due.	Three years	When the default is made, unless where the payee or obligee waives benefit of the provision, and then when fresh default is made in respect of which there is no such waiver.
On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	"	The date of the delivery to the payee
On a dishonoured foreign bill, where protest has been made and notice given.	"	When the notice is given.
By the payee against the drawer of the bill of exchange which has been dishonoured by non-acceptance.	"	The date of the refusal to accept.
By the acceptor of an accommodation bill against the drawer	"	When the acceptor pays the amount of the bill
Suit on a bill of exchange, promissory note or bond not herein expressly provided for.	"	When the bill, note or bond becomes payable
By a surety against the principal debtor.	"	When the surety pays the creditor.
By a surety against a co-surety.	"	When the surety pays anything in excess of his own share.
Upon any other contract to indemnify.	"	When the plaintiff is actually indemnified.

Description of suit	Period of limitation	Time from which period begins to run
For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years	The close of the year in which the last item admitted or proved is entered in the account, such year to be computed as in account
On a policy of insurance, when the sum assured is payable immediately after proof of the death or loss has been given to or received by the insurers	"	The date of the death or loss
By the assured to recover premia paid under a policy voidable at the election of the insurers	"	When the insurers elect to avoid the policy
Against a factor for an account.	"	When the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates
By a principal against his agent for movable property received by the latter and not accounted for	"	Do
Other suits by principals against agents for neglect or misconduct	"	When the neglect or misconduct becomes known to the plaintiff
For an account and a share of the profit of a dissolved partnership	"	The date of the dissolution
For arrears of rent	"	When the arrears become due.

Description of suit	Period of limitation	Time from which period begins to run.
For a call by a company registered under any Statute or Act	Three years	When the call is payable
For specific performance of a contract.	"	The date fixed for the performance or, if no such date is fixed, when the plaintiff has notice that performance is refused
For rescission of a contract	"	When the facts entitling the plaintiff to have the contract rescinded first become known to him
For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for	"	When the contract is broken, (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases
For compensation for the breach of a contract in writing registered.	Six years	When the period of limitation would begin to run against a suit brought on a similar contract not registered.

## STAMPS

### Modes of stamping

The stamp indicating the duty with which the various instruments are chargeable is either *impressed*

or *adhesive* All instruments except those mentioned below and which may be stamped with adhesive stamps must have to be written upon impressed stamps.

The following instruments may be stamped with adhesive stamp, namely —

(a) Instruments chargeable with the duty of two annas (for Bombay only), one anna, or half an anna, except parts of bills of exchange payable otherwise than on demand and drawn in sets;

(b) bills of exchange payable otherwise than on demand and drawn in sets when the amount of duty does not exceed one anna for each part of the set.

(c) bills of exchange, and promissory notes drawn or made out of British India,

(d) entry as an advocate, vakil or attorney on the roll of a High Court,

(e) notarial acts,

(f) transfers by indorsement of shares in any incorporated company or other body corporate

(g) transfers of debentures of public companies or associations,

(h) copies of maps and plans and printed copies when chargeable with duty

### **General rules**

(1) The duty of cancelling the adhesive stamp on such instruments is on the party affixing it and failing that, on whoever executes such an instrument.

Any instrument bearing an adhesive stamp which has not been cancelled so that it cannot be used again, shall, so far as such stamp is concerned, be deemed to be unstamped

(11) The cancellation may be made by writing the name or initials of the canceller with the true date of his so writing, or in any other effectual manner *e.g.* perforation.

(iii) All instruments chargeable with duty and executed in British India shall be stamped before or at the time of execution. On the other hand, the instrument chargeable with stamp duty and executed outside British India, not being a bill of exchange or promissory note, may be stamped within three months after it has been received in British India.

(iv) The following instruments when stamped with adhesive stamps shall be stamped with the following descriptions of such stamps, namely:—

(a) bills of exchange, and promissory notes drawn or made out of British India and chargeable with a duty of more than one anna, with stamps bearing the word *Foreign Bill*.

(b) Separate instruments of transfer of shares and transfers of debentures of Public Companies and Associations, with stamps bearing the word *Share Transfer*.

(c) Entry as an advocate, vakil or attorney on the roll of any High Court with stamps, bearing the word *Advocate, Vakil or Attorney* as the case may be.

(d) notarial acts, with foreign bill stamps bearing the word *Notarial*.

(e) Copies of maps or plans and printed copies certified to be true copies, with *Courtfee stamps*.

(f) An Agreement or Memorandum of an Agreement relating to the sale of a bill of exchange or relating to the sale of a Government security, or share in an incorporated company or other body corporate, and a Note or Memorandum sent by a broker or agent to his principal intimating the purchase or sale on account of such principal (a) of any goods exceeding in value twenty rupees; (b) of any stock or marketable security exceeding in value twenty rupees, with stamps bearing the words *Agreement*, or *Brokers Note* respectively.

(g) Instruments relating to policy of Insurance.

with stamps bearing the word *Insurance*

### Penalties

(1) Any person—

(a) drawing, making, issuing, endorsing, or transferring, or signing otherwise than as a witness, or presenting for acceptance or payment, or accepting, paying or receiving payment of, or in any manner negotiating, any bill of exchange (payable otherwise than on demand), or promissory note without the same being duly stamped, or

(b) executing or signing otherwise than as a witness any other instrument chargeable with duty without the same being duly stamped, or

(c) voting or attempting to vote under any proxy note duly stamped,

shall for every such offence be punishable with fine which may extend to five hundred rupees, *Provided* that, when any penalty has been paid in respect of any instrument under section 35, section 40 or section 61 of the Indian Stamp Act, the amount of such penalty shall be allowed in reduction of the fine (if any) subsequently imposed in respect of the same instrument upon the person who paid such penalty

(2) If a share warrant is issued, without being duly stamped, the company issuing the same, and also every person who, at the time when it is issued, is the managing director or the secretary or other principal officer of the company shall be punishable with fine which may extend to five hundred rupees.

(3) Failure to cancel an adhesive stamp effectually by a person required to do so under the Act, is liable to a fine up to one hundred rupees

(4) No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer,



unless such instrument is duly stamped ;

*Provided that—*

(a) any such instrument not being an instrument chargeable with a duty of one anna or half an anna only, or a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion :

(b) Where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it :

(c) Where a contract or agreement of any kind is effected by correspondence consisting of two or more letters, and any one of the letters bears the proper stamp the contract or agreement shall be deemed to be duly stamped.

### STAMP DUTY ON INSTRUMENTS

(i) Acknowledgment of a debt—exceeding twenty rupees in amount or value, written or signed by, or on behalf of, a debtor, in order to supply evidence of such debt in any book (other than a banker's passbook) or on a separate piece of paper when such book or paper is left in the creditor's possession, provided that such acknowledgment does not contain any promise to pay the debt or any stipulation to pay interest or to deliver any goods or other property.

*Stamp duty*, : India, Bombay, Bengal, Madras, one anna.

(ii) Adoption Deed

*Stamp duty*—India, (ten rupees) ; Bombay, Bengal, Punjab, (twenty rupees), Madras (fifteen rupees).

(iii) Affidavit, including an affirmation or declaration

in the case of persons by law allowed to affirm or declare instead of swearing

*Stamp duty* India (one rupee), Bombay Bengal, Madras, Punjab (two rupees)

*Exemptions*—Affidavit or declaration in writing when made (a) as a condition of enrolment under the Indian Army Act, 1911, or the Indian Air Force Act, 1932, (b) for the immediate purpose of being filed or used in any court or before the officer of any court, or (c) for the sole purpose of enabling any person to receive any pension or charitable allowance

(iv) Agreement or Memorandum of an Agreement.

(a) if relating to the sale of a bill of exchange,

*Stamp duty*. India (two annas), Punjab (four annas), Bengal, Madras (three annas)

(b) if relating to the sale of Government security, or share in an incorporated company or other body corporate

*Stamp duty* India (subject to a maximum of ten rupees, one anna for every Rs 10,000 or part thereof, of the value of the security or share), Bombay, Bengal (subject to a maximum of twenty rupees, two annas for every Rs 10,000 or part thereof, of the value of the security in its application to Government securities but two annas for every Rs 5,000 or part thereof, of the value of the share if the security is of an incorporated company or other body corporate, Madras (subject to a maximum of fifteen rupees, one and-a-half annas for every Rs 10,000 or part thereof, of the value of the security or share)

(c) if not otherwise provided for

*Stamp duty* India (eight annas), Bombay, Punjab (one rupee Madras (twelve annas)

*Exemptions*.—Agreement or memorandum of agreement (a) for or relating to the sale of goods or merchandise exclusively, not being a Note or Memorandum chargeable under Art 43, (b) made in the form of renders to the Government of India for or relating to any loan, (c) made under the European Vagrancy Act, 1874, section 17

(v) Agreement relating to deposit of Title Deeds, Pawn or Pledge, that is to say any instrument evidencing an agreement relating to

(1) the deposit of title-deeds or instrument constituting or being evidence of the title to any property whatever (other than a marketable security) or

(2) the pawn or pledge of moveable property, where such deposit, pawn or pledge has been made by way of security for the repayment of money advanced or to be advanced by way of a loan or an existing or future debt.

(a) if such loan or debt is repayable on demand or more than three months from the date of the instrument evidencing the agreement.

*Proper Stamp Duty* India, Bombay, The same duty as "Bill of Exchange, *post* for the amount secured. Bengal, Madras, Punjab -

		If drawn singly			If drawn in set of two for each part of the set			If drawn in three, for each part of the set		
		Rs.	As.	P.	Rs.	As.	P.	Rs.	As.	P.
(i) Where the amount of the loan or debt does not exceed Rs 200		0	4	6	0	3	0	0	1	6
(ii) Where but does not exceed										
Rs	Rs									
200	400	2	9	0	0	4	6	0	3	0
400	600	0	13	6	0	7	7	0	4	6
600	800	1	2	0	0	9	0	0	6	0
800	1,000	1	6	6	0	12	0	0	7	5
1,000	1,200	1	11	0	0	13	6	0	2	0
1,200	1,600	2	4	0	1	2	0	0	12	0
1,600	2,500	3	6	0	1	11	0	1	3	0
2,500	5,000	6	12	0	3	9	0	2	4	0
5,000	7,500	10	0	0	5	1	0	3	6	0
(Madras Rs. 10-2-0)										
7,500	10,000	13	8	0	6	12	0	4	8	0
10,000	15,000	20	4	0	10	2	0	6	12	0
15,000	20,000	27	0	0	13	8	0	9	0	0
20,000	25,000	33	12	0	16	14	0	11	4	0
25,000	30,000	40	8	0	20	4	0	13	8	0
and for every additional Rs. 10,000 or part thereof in excess of Rs. 30,000 ...		13	8	0	6	12	0	4	0	8

(b) if such loan or debt is repayable not more than three months from the date of such instrument.

*Stamp-Duty* India, Bombay (half the duty payable on a bill of Exchange *post*, for the amount secured), Bengal, Madras, Punjab (half the duty payable on a loan or debt under clause (a) (i) or clause (a) (ii) for the amount secured. In the case of Madras stamp duty of a quarter anna shall be reckoned as half anna and three-quarters anna as one anna

*Exemption* Instrument of pawn or pledge if goods unattested

(vi) Articles of Association of a company,

*Stamp-Duty* India (twenty-five rupees), Bombay - (a) where the company has no share capital or the nominal share capital does not exceed Rs 2,500 (twenty five rupees), (b) where the nominal share capital exceeds Rs 2,500 but does not exceed Rs 1,00,000 (rupees fifty), (c) where the nominal share capital exceeds Rs 1,00,000 (one hundred rupees), Bengal, (a) where the nominal share capital does not exceed one lakh of rupees (fifty rupees), (b) where nominal share capital exceeds one lakh of rupees (one hundred rupees), Madras (fifty rupees), Punjab (a) where the authorized share capital does not exceed Rs 1,00,000 (rupees twentyfive), (b) other cases (rupees fifty)

*Exemptions.* Articles of any Association not formed for profit and registered under section 26 of the Companies Act, 1882 (now of 1913)

(vii) Bill of Exchange not being a Bond, bank-note or currency note,

(a) where payable otherwise than on demand but not more than one year after date or sight

*Stamp-Duty.*

			If drawn singly	If drawn in sets of two. for each part of the set	If drawn in sets of three for each part of the set
			Rs a	Rs. a	Rs. a.
When the amount of the bill or note does not exceed Rs 200			0 3	0 2	0 1
If it exceeds Rs 200 but does not exceed Rs 400			0 6	0 3	0 2
Do. 400	do	600	0 9	0 5	0 3
Do. 600	do	800	0 12	0 6	0 4
Do 800	do.	1,000	0 15	0 8	0 5
Do. 1,000	do	1,200	0 2	0 9	0 6
Do 1,200	do.	1,600	1 8	0 12	0 8
Do. 1,600	do.	2 500	2 4	1 2	0 12
Do. 2,500	do.	5 000	4 8	2 4	1 8
Do 5 000	do	7,500	6 12	3 6	2 4
Do. 7,500	do.	10,000	9 0	4 8	3 0
Do 10,000	do.	15 000	13 8	6 12	4 8
Do. 15 000	do	20 000	18 0	9 0	6 0
Do 20,000	do	25 000	22 8	11 4	7 8
Do 25,000	do	30,000	27 0	13 8	9 0
and for every additional					
Rs 10 000 or					
part thereof in excess of					
Rs. 30,000 . .			9 0	4 8	3 0

(b) where payable more than one year after date or sight the same duty as for a bond for the same amount.

(viii) Bill of Lading, including a through bill of lading

*Stamp-Duty*: India (four annas); Bombay, Punjab (eight annas), Madras (six annas). N.B If a bill of lading is drawn in parts, the proper stamp must be borne by each one of the set.

*Exemptions.* (a) Bill of lading when the goods therein described are received at a place within the limits of any port as defined under the Indian Ports Act, 1889 (now XV of 1908) and are to be delivered at another place within the limits of the same port, (b) Bill of lading when executed out of British India and relating to property to be delivered

in British India; (c) Bills of lading of Inland steamer companies

(ix) Bond not being a debenture, and not being otherwise provided for

Where the amount or value secured does not exceed Rs 10	Two annas
Where it exceeds Rs 10 and does not exceed Rs 50	Four annas
Where it exceeds Rs. 50 and does not exceed Rs 100	Eight annas
Where it exceeds Rs 100 and does not exceed Rs 200	India (rupee one), Madras (Re one, annas four)
Where it exceeds Rs 200 and does not exceed Rs 300	India (rupee one annas eight), Bombay (rupees two, annas four) Madras, Punjab, Bengal (Re one annas ten)
Where it exceeds Rs 300 and does not exceed Rs 400	India (rupees two), Bombay (three rupees) Bengal Madras, Punjab (rupees two annas eight)
Where it exceeds Rs 400 and does not exceed Rs 500	India (rupees two, annas eight), Bombay (rupees two annas twelve)
Where it exceeds Rs. 500 and does not exceed Rs 600	India (rupees three) Bombay, Bengal, Madras Punjab (rupees four, annas eight)
Where it exceeds Rs 600 and does not exceed Rs. 700	India (rupees three, annas eight) Bombay, Bengal. Madras, Punjab, (rupees five annas four)
Where it exceeds Rs 700 and does not exceed Rs 800	India (rupees four) Bombay, Bengal, Madras, Punjab (rupees six)
Where it exceeds Rs. 800 and does not exceed Rs 900	India (rupees four, annas eight); Bombay, Bengal, Madras Punjab (rupees six, annas twelve)
Where it exceeds Rs. 900 and does not exceed Rs 1,000.	India (rupees five), Bombay, Bengal, Madras, Punjab (rupees seven, annas eight)
and for every Rs. 500 or part thereof in excess of Rs. 1 000.	India (rupees two annas eight); Bombay, Bengal, Madras, Punjab (rupees three, annas twelve)

*Exemptions:* Bond, when executed by (a) headman nominated under the Bengal Irrigation Act, 1876, (b) any person for the purpose of guaranteeing that the local income derived from private subscriptions to a charitable dispensary or hospital or any other subject of public utility shall not be less than a specified sum per mensem.

**Bottomry Bond**, that is to say, any instrument whereby the master of a seagoing ship borrows money on the security of the ship to enable him to preserve the ship or prosecute her voyage

*Proper Stamp-Duty.* India, the same duty as for a Bond, for the same amount, Bengal, Madras, Punjab.-

where the amount or value secured does not exceed

Rs 10	"	"	"	"	three annas.
where it exceeds Rs 10 and does not exceed Rs 50	six	annas.			
" " " 50	"	"	"	"	100 twelve annas.
" " " 100	"	"	"	"	200 one puce eight annas
" " " 200	"	"	"	"	300 two rupees four annas
" " " 300	"	"	"	"	400 three rupees.
" " " 400	"	"	"	"	500 three rupees twelve annas
" " " 500	"	"	"	"	600 four rupees eight annas.
" " " 600	"	"	"	"	700 five rupees four annas
" " " 700	"	"	"	"	800 six rupees.
" " " 800	"	"	"	"	900 six rupees twelve annas.
" " " 900	"	"	"	"	1,000 seven rupees eight annas
and for every " 500 or part thereof in					
excess of " 1,000	three	rupees			
	eight	annas.			

**Administration bond**, including a bond given under the Indian Succession Act, the Government Savings Bank Act, and the Probate and Administration Act.

(a) Where the amount does not exceed Rs. 1,000

*Stamp-Duty:* The same duty as for a Bond for such amount

(b) in any other case-India (Five rupees), Bombay, Bengal, Madras, Punjab (Rs Ten).

(x) **Certificate of sale**, in respect of each property put up as a separate lot and sold, granted to the purchaser

of any property sold by public auction by a civil or Revenue Court, or Collector or other Revenue officer.

(a) Where the purchase money does not exceed Rs 10  
*Stamp-Duty*. India (two annas), Bombay (four annas), Bengal, Madras, Punjab (Three annas)

(b) Where the purchase money exceeds Rs 10 but does not exceed Rs 25

*Stamp-Duty* India (four annas), Bombay (eight annas), Bengal, Madras, Punjab (six annas)

(c) In any other case

*Stamp-Duty* The same duty as a Conveyance for a consideration equal to the amount of the purchase money only

(xi) Certificate or other Document evidencing the right or title of the holder thereof, or any other person either to any shares scrip or stock in or of any incorporated company or other body corporate, or to become proprietor of shares, scrip or stock in or of any such company or body.

*Stamp-Duty* Two annas

(xii) Cheque - Exempted from stamp-duty

(xiii) Conveyance, not being a 'transfer', *post*

### *Stamp-Duty*

Where the amount or value of the consideration for such conveyance as set forth therein does not exceed Rs 50	India (annas eight), Bengal, Madras, Punjab (annas twelve)
Where it exceeds Rs 50 but does not exceed Rs 100	India (rupees one), Bengal, Madras, Punjab (Rupees one annas eight)
Where it exceeds Rs 100 but does not exceed Rs 200	India (rupees two), Bengal, Madras, Punjab (rupees three)
Where it exceeds Rs 200 but does not exceed Rs 300	India (rupees three), Bombay ( <i>save</i> as the City of Bombay, eight rupees, eight annas, and the cities of Ahmedabad, Poona and Karachi, six rupees eight annas), Bengal, Madras, Punjab (rupees four annas eight).



Where it exceeds Rs. 300 but does not exceed Rs. 400	India (rupees four), Bombay ( <i>save</i> as the city of Bombay, twelve rupees, and the cities of Ahmedabad, Poona and Karachi, nine rupees), Bengal, Madras, Punjab (rupees six)
Where it exceeds Rs. 400 but does not exceed Rs. 500	India (rupees five), Bombay, <i>save</i> as the City of Bombay, fifteen rupees, eight annas and the cities of Ahmedabad, Poona and Karachi eleven rupees eight annas), Bengal, Madras, Punjab (rupees seven, annas eight)
Where it exceeds Rs. 500 but does not exceed Rs. 600.	India (rupees six), Bombay ( <i>save</i> as the City of Bombay, nineteen rupees and the cities of Ahmedabad, Poona and Karachi, fourteen Rupees), Bengal, Madras Punjab (rupees nine).
Where it exceeds Rs. 600 but does not exceed Rs. 700	India (rupees seven), Bombay, ( <i>save</i> as to the city of Bombay, twenty two rupees eight annas and the cities of Ahmedabad, Poona and Karachi, sixteen rupees eight annas, Bengal, Madras, Punjab (rupees ten, annas eight)
Where it exceeds Rs. 700 but does not exceed Rs. 800	India (rupees eight), Bombay ( <i>save</i> as to the city of Bombay twenty six rupees, and the cities of Ahmedabad, Poona and Karachi, nineteen rupees), Bengal, Madras, Punjab (rupees twelve).
Where it exceeds Rs. 800 but does not exceed Rs. 900	India (rupees nine); Bombay ( <i>save</i> as to the city of Bombay, twenty nine rupees eight annas, and to the cities of Ahmedabad, Poona, and Karachi, twenty one rupees eight annas), Bengal, Madras, Punjab (thirteen Rs, annas eight).
Where it exceeds Rs. 900 but does not exceed Rs. 1,000.	India (rupees ten), Bombay ( <i>save</i> as to the city of Bombay, thirty three rupees, and the cities of Ahmedabad, Poona and Karachi, twentyfour rupees) Bengal, Madras, Punjab (rupees fifteen).

and for every Rs 500 or part thereof in excess of Rs 1,000 India (rupees five), Bombay (*save* as to the city of Bombay, seventeen rupees eight annas, and to the cities of, Ahmdabad Karachi and Poona, twelve rupees eight annas), Bengal, Madras Punjab (rupees seven, annas eight)

*Exemptions* (1) Assignment of copyright by entry made under the Indian Copyright Act, 1847 (see now III of 1914)

(2) Sanad of Jagir or other instrument conveying land granted to an individual by the Government otherwise than for a pecuniary consideration, in the *Central Provinces*, conveyance by indorsement of rights secured by an instrument known as "Satta"-

*Surcharge* In the case of instruments of sale, gift and mortgage with possession of immoveable property situated within the limits of the city of Madras, a surcharge of  $1\frac{1}{2}$  per cent on the amount of consideration set forth in the instrument

(xiv) **Customs Bond**

(a) when the amount does not exceed Rs 1,000 India, the same duty as a Bond for such amount, Bengal, Madras, Punjab the same duty as a Bottomry Bond for such amount

(b) in any other case India, (rupees five), Bombay, Bengal, Madras, Punjab (rupees ten)

(xv) **Debenture** (whether a mortgage debenture or not), being a marketable security transferable)

(a) By endorsement or by a separate instrument of transfer. India (the same duty as for a Bond), Bengal, Madras, Punjab (same duty as a Bottomry Bond)

(b) By delivery The same duty as a conveyance

*Explanation* The term "Debenture" includes any interest coupons attached thereto, but the amount of such coupons shall not be included in estimating the duty

*Exemption* A debenture issued by an incorporated company or other body corporate in terms of a registered

mortgage-deed, duly stamped in respect of the full amount of debentures to be issued thereunder, whereby the company or body borrowing makes over, in whole or in part, their property to trustees for the benefit of the debenture holders, provided that the debentures so issued are expressed to be issued in terms of the said mortgage-deed,

For renewal of any of the Foreshore securities issued by the Trustees of the Port of Bombay under the provisions of section 30 of the Bombay Port Trust Act, 1879

- (xvi) **Delivery order in respect of goods**, that is to say, any instrument entitling any person therein named, or his assignee or the holder thereof, to the delivery of any goods lying in any dock or post, or in any warehouse in which goods are stored or deposited on rent or hire, or upon any wharf, such instrument being signed by or on behalf of the owner of such goods upon the sale or transfer of the property therein, *when such goods exceed in value twenty rupees*

*Stamp Duty:* one anna.

- (xvii) **Gift. instrument of, not being a Settlement, or Will or Transfer.**

*Stamp-Duty:* The same duty as a conveyance, *but* in the case of the cities of Bombay, Ahmedabad, Poona and Karachi the same duty as is leviable on conveyance in those cities as explained above

- (xviii) **Indemnity Bond.**

*Stamp Duty:* The same duty as a Security Bond.

- (xix) **Leases, including an under-lease and any agreement to let or sub-let**

(a) Whereby under such lease the rent is fixed and no premium is paid or delivered

(i) Where the lease pur- India (the same duty as a Bond),  
ports to be for a term of less and Bengal, Madras, Punjab  
than one year (the same duty as a Bottomry  
Bond) for the whole amount  
payable or deliverable under  
such lease.

(ii) Where the lease pur- India (the same duty as a Bond)  
ports to be for a term of not less and Bengal, Madras, Punjab  
than one year but not more than (the same duty as a Bottomry  
Bond) for the amount or value  
of the average annual rent

*reserved but in the case of Bengal and Madras in its application to a lease where it purports to be for a term of not less than one year and not more than five years*

(iii) Where the lease purports to be for a term in excess of three years,

India (the same duty as for a conveyance for a consideration equal to the amount or value of the average annual rent reserved), Bengal, Madras and Punjab (the same duty as for conveyance for a consideration equal to the amount of value of the average annual rent reserved for a term exceeding five years but not exceeding ten years, for a consideration equal to twice the amount or value of the average annual rent reserved for a term exceeding ten years but not exceeding twenty years, for a consideration equal to three times the amount or value of the average annual rent reserved for a term exceeding twenty years but not exceeding thirty years, for a consideration equal to four times the amount or value of the average annual rent reserved for a term exceeding thirty years but not exceeding one hundred years).

(iv) Where the lease does not purport to be for any definite period.

India (The same duty as for a conveyance for a consideration equal to the amount or value of the average annual rent which would be paid or delivered for the first ten years if the lease continued so long), Bengal, Madras Punjab (The same duty as for a conveyance for a consideration

equal to three times the amount or value of the average rent which would be paid or delivered for the first ten years if the lease continued so long )

- (v) Where the lease pur- India (The same duty as for a  
ports to be in perpetuity conveyance for a consideration  
equal to one fifth of the whole  
amount of rents which would  
be paid or delivered in re-  
spect of the first fifty years of  
the lease), Bengal and Punjab  
(the same duty as for a con-  
veyance, for a consideration  
equal in the case of a lease  
granted solely for agricultural  
purposes to one-tenth and in  
any other case to one-sixth of  
the whole amount of rents  
which would be paid or deliv-  
ered in respect of the first  
fifty years of the lease *in its  
application to a lease where  
it purports to be for a term  
exceeding one hundred years  
or in perpetuity*. Madras (the  
same duty as for a considera-  
tion equal to one-sixth of the  
whole amount of rents which  
would be paid or delivered in  
respect of the first fifty years  
of the lease *in its application  
to a lease where it purports  
to be for a term exceeding  
one hundred years or in per-  
petuity*.

(b) where the lease is granted for a fine or premium or for money advanced and where no rent is reserved.

*Stamp Duty* "The same duty as for a conveyance for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease.

(c) where the lease is granted for a fine or premium or for money advanced in addition to rent reserved.

*Stamp duty* India (the same duty-as for a conveyance for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease, in addition to the duty which would have been payable on such lease, if no fine or premium or advance had been paid or delivered *Provided* that, in any case when an agreement to lease is stamped with *ad valorem* stamp required for a lease, in pursuance of such agreement is subsequently executed, the duty on such lease shall not exceed eight annas), Bengal Madras, Punjab, the same duty as for a conveyance, for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease, in addition to the duty which would have been payable on such lease, if no fine or premium or advance had been paid or delivered *Provided* that, in any case when an agreement to lease is stamped with the *ad valorem* stamp required for a lease, and a lease in pursuance of such agreement is subsequently executed, the duty on such lease shall not exceed twelve annas

*Explanation* (Bengal, Madras, Punjab)— when a lessee undertakes to pay any recurring charge, such as Government revenue, the landlord's share of cesses or the owner's share of municipal rates or taxes which is by law recoverable from the lessor, the amount so agreed to be paid by the lessee shall be deemed to be part of the rent

### Exemptions

(a) Lease executed in the case of a cultivator and for the purposes of cultivation including a lease of trees for the production of food or drink, without the payment or delivery of any fine or premium, when a definite term is expressed and such term does not exceed one year or when the average annual rent reserved does not exceed one hundred rupees

In this exemption a lease for the purposes of cultivation shall include a lease of land for cultivation together with an homestead or tanks

(xx) Letter of allotment of shares in any company or proposed company, or in respect of any loan to be raised by any company or proposed company

*Stamp Duty* . two annas .

(xxi) Letter of credit . two annas

(xxii) Memorandum of Association of a company

(a) if accompanied by articles of association

*Stamp Duty* India (rupees fifteen), - Bombay, Madras, Punjab (rupees thirty)

(b) if not so accompanied

*Stamp Duty*: India (rupees forty); Bombay, Madras, Punjab (eighty rupees)

*Exemption* Memorandum of any association not formed for profit and registered under section 26 of the Indian Companies Act, 1882 (now of 1913)

(xiii) Mortgage deed, not being an "Agreement relating to Deposit of Title-deeds, Power or Pledge."

(a) when possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given.

*Stamp Duty*. India (the same duty as for a conveyance for a consideration equal to the amount secured by such deed (with special duty for the cities of Bombay, Ahmedabad, Poona and Karachi according to the duty on conveyance prescribed for these cities).

(b) when possession is not given or agreed to be given as aforesaid.

*Explanation*. A Mortgagor who gives to the mortgagee a power-of-attorney to collect rents or a lease of the property mortgaged or part thereof is deemed to give possession for the purpose of fixing duty)

*Stamp Duty*. India (the same duty as for a Bond), Madras (the same duty as for a Bottomry Bond) for the amount secured by such deed,

(c) when a collateral or auxiliary or additional or substituted security, or by way of further assurance for the above mentioned purpose where the principal or primary security is duly stamped.

for every sum secured not exceeding Rs 1,000 India (annas eight), Bombay (one rupee), Bengal, Madras, Punjab (Annas twelve)

and for every Rs. 1,000 or part thereof secured in excess of Rs. 1,000 India (annas eight), Bombay (rupee one), Bengal, Madras, Punjab (Annas twelve)

*Exemption*: (1) Instrument executed by persons taking advances under the Land Improvement Loans Act, 1883, or the Agriculturists' Loans Act, 1884 or by their sureties as securities for the repayment of such advances

(2) Letter of hypothecation accompanying a bill of exchange.

*Remission*: (In the Punjab and N.W.F.P. and in the

U.P.) on mortgage-deed executed afresh in lieu of a previous mortgage-deed for the purpose of giving effect to the provisions of S 9 (2) of the Punjab Alienation of Land Act, and of S 9 (2) or S 17 of the Bundelkhand Alienation of Land Act, 1903—so much of the duty as is not in excess of the duty already paid in respect of the previous mortgage-deed

*Reduction* on a mortgage-deed being a collateral or auxiliary or additional security or being by way of further assurance—in the U.P. and the Province of Assam, where the principal or primary security is duly stamped in any case in which the sum secured is in excess of Rs 20,000—duty reduced to the amount of duty which would be chargeable under (c) above if the sum secured were Rs 20,000. Duty reduced to Rs 20 in Presidency of Bombay, to Rs 15 in the Presidency of Madras or in the Province of the Punjab and Rs 10 in the Presidency of Bengal, the C.P. and the Provinces of Bihar and Orissa, provided that the duty paid on the principal or primary security exceeds the amount specified for that presidency or province

(xxiv) Notarical Act, that is to say, any instrument, endorsement, note, attestation, certificate or entry not being a protest, made or signed by a Notary Public in the execution of the duties of his office, or by any other person lawfully acting as a Notary Public

*Stamp Duty* India (one rupee), Bombay, Bengal, Punjab (rupees two), Madras (rupee one annas eight)

(xxv) Note of Memorandum sent by a Broker or Agent to his principal intimating the purchase or sale on account of such principal

(a) of any goods exceeding in value twenty rupees

*Stamp Duty* India (two annas), Bombay (four annas), Bengal, Madras, Punjab (three annas)

(b) of any stock or marketable security exceeding in value twenty rupees.

*Stamp Duty* India (subject to a maximum of ten rupees one anna for every Rs. 10,000 or part thereof of the value of the stock or security); Bengal, Madras, Punjab (subject to a maximum of rupees fifteen, two annas for every Rs. 10,000 or part thereof of the value of the stock or security), Bombay (subject to a maximum of Rs. 20, two annas for every Rs. 5,000 or part thereof of the value of the stock or security not being Government security; in respect of a Government security—subject to a maximum of Rs. 20, two annas for every Rs. 10,000 or part thereof of the value of the security



## (xxvi) Partnership

## (A) Instrument of.—

(a) where the capital of the partnership does not exceed Rs. 500

*Stamp Duty* India (rupees two annas eight), Bombay, Bengal, Madras (rupees five)

(b) in any other case.

*Stamp Duty* India (rupees ten), Bombay, Madras (rupees twenty).

## (B) Dissolution of—

*Stamp Duty* India ( five rupees ), Bombay, Bengal, Madras (ten rupees).

## (xxvii) Policy of Insurance.

## A—Sea Insurance

(1) for or upon a voyage—

(i) where the premium or consideration does not exceed the rate of two annas or one-eighth per centum of the amount insured by the policy.

*Stamp Duty* If drawn singly (one anna), if drawn in duplicate for each part (half an anna)

(ii) in any other case, in respect of every full sum of one thousand five hundred rupees and also any fractional part of one thousand five hundred rupees insured by the policy

*Stamp Duty* : If drawn singly (one anna) if drawn in duplicate for each part (half an anna.)

(2) for time.

(iii) in respect of every full sum of one thousand rupees and also any fractional part of one thousand rupees insured by policy—

where their insurance shall be made for any time not exceeding six months

*Stamp duty* . If drawn singly two annas), if drawn in duplicate for each part (one anna).

where the insurance shall be made for any time exceeding six months and not exceeding twelve months

*Stamp duty* If drawn singly (four annas), if drawn in duplicate from each part (two annas )

B-Fire Insurance and other classes of Insurance, not elsewhere included in this article, 'covering goods, merchan-

dise, personal effects, crops and other property against loss or damage-

(1) in respect of an original policy-

(i) when the sum insured does not exceed Rs 5,000 ,  
*Stamp-Duty* . (eight annas).

(ii) in any other case

*Stamp-Duty* (one rupee).

(2) in respect of each receipt for any payment of a premium or any renewal of an original policy.

*Stamp-Duty* (one half of the duty payable in respect of the original policy in addition to the amount, if any, chargeable under 'Receipt'

C-Accident and Sickness Insurance-

(a) against railway accident, valid for a single journey only ,

*Stamp-Duty* (One anna)

*Exemption* When issued to a passenger travelling by the intermediate or the third class in any railway

(b) in any other case—for the maximum amount which may become payable in the case of any single accident or sickness where such amount does not exceed Rs 1,000 and also where such amount exceeds Rs 1,000 for every Rs 1,000 or part thereof

*Stamp-Duty* (Two annas) *Provided* that in case of a policy of insurance against death by accident when the annual premium payable does not exceed Rs 2-8-0 per Rs 1,000 the duty of such instrument shall be one anna for every Rs 1,000 or part thereof of the maximum amount which may become payable under it

C-Insurance by way of indemnity against liability to pay damage on account of accidents to workmen employed by or under the insurer or against liability to pay compensation under the Workmen's Compensation Act, 1923, for every Rs 100 or part thereof payable as premium

*Stamp-Duty* one anna

D-Life Insurance or other Insurance not specifically provided for, except such a Re-Insurance as is described in E below-

(1) for every sum insured not exceeding Rs 250 ,

*Stamp-Duty* If drawn singly (two annas) , if drawn in duplicate, for each part (one anna)

(ii) for every sum insured exceeding Rs. 250 but not exceeding Rs. 500.

*Stamp-Duty* : If drawn singly (four annas); if drawn in duplicate, for each part (two annas).

(iii) for every sum exceeding Rs. 500 but not exceeding Rs. 1,000 and also for every Rs 1,000 or part thereof in excess of Rs. 1,000.

*Stamp-Duty*. If drawn singly (six annas); If drawn in duplicate, for each part (three annas).

*Exemption* : policies of life insurance granted by the Director-General of Post Offices in accordance with rules for postal Life Insurance issued under the authority of the Governor-General in Council.

E- Re-Insurance Company, which has granted a policy of the nature specified in Division A or Division B above with another company by way of indemnity or guarantee against the payment on the original insurance of a certain part of the sum insured thereby.

*Stamp-Duty*: (one-quarter of the duty payable in respect of the original insurance but not less than one anna or more than one rupee)

*General exemption* : Letter of cover or engagement to issue a policy of insurance, *provided* that, unless such letter or engagement bears the stamp prescribed by this Act for such policy, nothing shall be claimable thereunder, nor shall it be available for any purposes, except to compel the delivery of the policy therein mentioned

(xxviii) Power-of-Attorney, not being a proxy

(a) When executed for the sole purpose of procuring the registration of one or more documents in relation to a single transaction or for admitting execution of one or more of such documents;

*Stamp-Duty* : India (eight annas); Bombay, Punjab (rupee one); Bengal, Madras (annas twelve).

(b) when required in suits or proceedings under the Presidency Small Cause Courts Act, 1882.

*Stamp-Duty* : India (eight annas), Bombay, Bengal, Punjab (one rupee); Madras (twelve annas).

(c) when authorizing one person or more to act in a single transaction other than the case mentioned in clause (a)

*Stamp-Duty* : India (one rupee); Bombay, Punjab (two

rupees), Bengal, Madras (rupee one and annas eight).

(d) When authorizing not more than five persons to act jointly and severally in more than one transaction or generally,

*Stamp-Duty* India (five rupees), Bombay, Punjab (rupees ten), Bengal, Madras (rupees seven, eight annas).

(e) When authorizing more than five but not more than ten persons to act jointly and severally in more than one transaction or generally

*Stamp-Duty*, India (rupees ten), Bombay Punjab (rupees twenty), Bengal, Madras (rupees fifteen)

(f) When given for consideration and authorising the attorney to sell any immoveable property.

*Stamp-Duty*: (The same duty as for a conveyance for the amount of the consideration)

(g) in any other case

*Stamp-Duty*: India (rupee one for each person authorized), Bombay, Punjab (rupees two for each person authorized), Bengal, Madras (rupee one annas eight for each person authorized)

*N B* The term "Registration" includes every operation incidental to registration under the Indian Registration Act, 1908

*Explanation* for the above purpose more persons than one when belonging to the same firm shall be deemed to be one person

*Remissions* (1) on a written authority executed under Rule I, Order xxviii of the C P C by an officer actually serving the Government in a military capacity authorizing any person to sue or defend in his stead in a Civil Court (2) in respect of letters of authority or power of attorney executed for the sole purpose of authorizing one or more of the joint holders of a Government security to give on behalf of the other or others of them, or any one or more of them a discharge for interest payable on such security or on any renewed security issued in lieu thereof power-of-attorney furnished to a relative, servant or defendant under the Dekkhan Agriculturists' relief Act, 1879

#### (xxix) Promissory Note

(a) when payable on demand-

(1) when the amount or value does not exceed Rs 250,  
*Stamp-Duty* (one anna).



of land assessed to Government revenue or (in the presidencies of Fort St George and Bombay) of Inam Lands,

(4) for pay or allowance by non-commissioned or petty officers, sailors or airmen of His Majesty's Military or Air Forces when serving in such capacity, or by mounted police constables,

(5) given by holders of family certificates in cases where the person from whose pay or allowances the sum comprised in the receipt has been assigned is a non-commissioned or petty officer, soldier, sailor or airman of any of the said forces and serving in such capacity,

(6) for persons or allowances by persons receiving such pensions or allowances in respect of their service as such non-commissioned or petty officers, soldiers, sailors or airmen and not serving the Government in any other capacity,

(7) given by a headman or lambardar for land revenue or taxes collected by him,

(8) given for money or securities for money deposited in the hands of any banker, to be accounted for

Provided that the same is not expressed to be received, of, or by the hands of, any other than the person to whom the same is to be accounted for

Provided also that this exemption shall not extend to a receipt or acknowledgment for any sum paid or deposited for or upon a letter of allotment of a share, or in respect of a call upon any scrip or share of, or in, any incorporated company or other body corporate or such proposed or intended company or body or in respect of a debenture being a marketable security

*Remissions* Stamp-duty has been remitted on the following

(1) Receipt given by, or on behalf of, a depositor in a Post Office Savings Bank for sum of money withdrawn from any such Bank. (2) Receipt endorsed by the payee on a postal money order or given by the Payee to the Post Office for a sum paid to him in adjustment of a short or wrong payment of such an order (3) Receipt endorsed by the holder of a Post Office Cash Certificate at the time of its discharge (4) Receipt or bill of lading issued by a Railway Company or Administration or an Inland Steamer Company for the fare for the conveyance of passengers or goods, or both, or animals or for any charges incidental to the conveyance thereof or given to such company or Admini-

nistration or Inland Steamer Company for the refund of an overcharge made in respect of such fare or charges (5) Receipt given by a Railway Company or Administration or an Inland Steamer Company for money received by it from another Railway Company or Administration or Inland Steamer Company or from a Tramway Company or other Carrying Company on account of its share of fares or freight for the conveyance in through traffic of passengers or goods, or of animals (6) Receipt or bill of lading issued by the Commercial Carrying Company, Ltd, for the fare for the conveyance of passengers or goods or both or receipt given by the said Company for the refund of an overcharge made in respect of such share. (7) Receipt given for interest paid in British India on securities of the Mysore Darbar (8) Receipt given for interest on Government of India Promissory Notes (9) Receipt given by a person, for advances exceeding Rs. 20 received by him from Government under the Agriculturists' Loan Act, 1884.

(xxxii) Security-Bond or Mortgage-Deed, executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract,-

(a) Where the amount secured does not exceed Rs. 1,000.

*Stamp-Duty* : India (the same duty as for a Bond for the amount secured), Madras, Punjab (the same duty as for a Bottomry Bond for the amount secured)

(b) in any other case

*Stamp-Duty* India (five rupees); Bombay (ten rupees) Madras, Punjab (seven rupees eight annas)

*Exemption* · Bond or other instrument when executed-

(a) by headmen nominated under rules framed in accordance with the Bengal Irrigation Act, 1876, Section 99, for the due performance or their duties under that Act,

(b) by any person for the purpose of guaranteeing that the local income derived from private subscriptions to a charitable dispensary or hospital or any other object of public utility shall not be less than a specified sum per mensem.

(c) under No 3-A of the rules made by the Governor of Bombay in Council under Section 70 of the Bombay Irrigation Act, 1879,

(d) executed by person taking advances under the Land Improvement Loans Act, 1883, or the Agriculturists'

Loans Act, 1884, or by their sureties, as security for the repayment of such advances,

(e) executed by officers of Government or their sureties to secure the due execution of an office or the due accounting for money or other property received by virtue thereof

(xxxiv) Share Warrants to bearer issued under Indian Companies Act

*Stamp-Duty*. (One and a half times the duty payable on a conveyance, for a consideration equal to the nominal amount of the share specified in the warrants)

*Exemptions*. Share warrant when issued by a company in pursuance of the Indian Companies Act to have effect only upon payment as composition for that duty, to the Collector of Stamp-Revenue, of—

(a) one and a half per centum of the whole subscribed capital of the company, or (b) if any Company has paid the said duty or composition in full subsequently issues an addition to its subscribed capital one and a half per centum of the additional capital so issued

(xxxv) Transfer (whether with or without consideration)—

(a) of shares in an incorporated company or other body corporate,

*Stamp Duty* (one half of the duty payable on a conveyance, for a consideration equal to the value of the share),

(b) of debenture, being marketable securities, whether the debenture is liable to duty or not

*Stamp-Duty*, (one-half or the duty payable on a conveyance for a consideration equal to the face amount of the debenture),

(c) of any interest secured by a bond, mortgage-deed or policy of insurance —

(i) if the duty on such bond, mortgage-deed or policy does not exceed five rupees,

*Stamp-Duty* (the Duty with which such bond, mortgage-deed or policy of insurance is chargeable.

(ii) in any other case

*Stamp-Duty* India (five rupees), Bombay (ten rupees), Madras, Punjab (seven rupees eight annas)



(d) of any property under the Administrator General's Act, 1913, S. 31

*Stamp-Duty.* India (ten rupees); Bengal, Madras, Punjab (fifteen rupees), but in its application to the Administration General's Act, 1913, S. 25,

(e) of any trust property without consideration from one trustee to another trustee or from a trustee to a beneficiary.

*Stamp-Duty* India (five rupees or such smaller amount as may be chargeable under clauses (a) to (c) above), Bengal (seven rupees eight annas or such smaller amount as may be chargeable under clauses (a) to (c) above).

*Exemptions.* Transfers by endorsement—

- (a) of a bill of exchange, cheque or promissory note;
- (b) of a bill of lading, delivery order, warrant for goods or other mercantile documents of title to goods,
- (c) of a policy of insurance.
- (d) of securities of the Government of India

*Remission*

(1) Stamp-Duty chargeable on transfers to Government of shares of the Reserve Bank of India under clause (ii) of S. 4 of the Reserve Bank of India Act, 1934, has been remitted prospectively and retrospectively.

(2) Stamp-duty has been remitted on the following

(a) transfer by endorsement of a mortgage of rates and taxes authorized by any Act for the time in force in British India,

(b) deed evidencing transfer of any debenture floated by the Central Land Mortgage Bank Madras.

(c) Instrument of transfer of Government Stock registered in the book debt account,

(d) Instrument of transfer shares registered in a branch register in the United Kingdom under the provision of India Companies Act, which has paid the stamp-duty leviable thereon in accordance with the law for the time being in force in the United Kingdom.

(xxxv) Trust.

A — Declaration of—of, or concerning, any property when made by any writing not being a will,

*Stamp Duty.* India (the same as for a Bond for a sum equal to the amount or value of the property concerned as



## CHAPTER XIV

# ARBITRATION

### **Arbitration Agreement.**

An "arbitration agreement" is defined as a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. The person appointed to adjudicate upon the difference is called an *Arbitrator*. Where two arbitrators are appointed and the agreement provides that in the event of their disagreement, the matter in dispute shall be referred to the decision of a third person, such third person is called an *Umpire*. The decision of the arbitrator or arbitrators is called an *award*.

### **What matters can be referred to arbitration**

Generally speaking, all matters, which can be made the subject of a contract can be referred to arbitration. Thus, purely criminal matters cannot be submitted to arbitration; but any civil difference or civil right, for which a criminal prosecution is also instituted, may be referred to arbitration so far as the civil side of the question is concerned. A divorce suit cannot be submitted to arbitration, as in such cases the jurisdiction of the matrimonial court is exclusive, but the terms of separation may be submitted to arbitration.

### **Modes of reference.**

A reference (or submission as it is called) to arbitration may be made in one of the three ways:

- (1) By agreement between the parties without the intervention of the court, or
- (2) Through the intervention of the court; or
- (3) By the operation of statutes.

### **Arbitration without intervention of court**

The parties may by a written "arbitration agreement" agree to refer a matter of difference to arbitration, without the intervention of the court. In every such agreement the following terms are implied unless the parties provide otherwise :

1 Unless otherwise expressly provided, the reference shall be to a sole arbitrator

2 If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments

3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.

4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators

5. The umpire shall make his award within two months of entering on the reference or within such extended time as the Court may allow.

6 The parties to the reference and all persons claiming under them shall, subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in difference and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts writings, and documents, within their possession or power respectively, which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require.

7. The award shall be final and binding on the parties and on persons claiming under them respectively.

8. The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom, and in what manner, such costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between legal practitioner and client

*Appointment of Arbitrators.* The parties to an arbitration agreement may provide that the arbitrator or arbitrators will be appointed by consent of the parties. In such a case the parties appoint the arbitrator or arbitrators. But if the parties do not, after differences have arisen, agree to the appointment, or if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the parties do not supply the vacancy, or if the parties or arbitrators are required to appoint an umpire and do not appoint him, any party may serve the other party with a written notice to concur in the appointments or in supplying the vacancy. If appointment is not made within fifteen days after the service of the said notice the court may on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or an umpire, as the case may be, who shall have power to act in the reference and to make an award.

The parties to an arbitration agreement may agree that any reference thereunder shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment.

*Powers of arbitrator or umpire :* The arbitrators or umpire shall, unless a different intention is

expressed in the agreement, have power to (a) administer oath to the parties and witnesses appearing, (b) state a special case for the opinion of the court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the court, (c) make the award conditional or in the alternative, (d) correct in an award any clerical mistake or error arising from any accidental slip or omission, (e) administer to any party to the arbitration such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary

*Signing and filing of the award:* When the arbitrators or umpire have made their award, they have to sign it and give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award. The arbitrators must also file the award or a signed copy of it to the court, at the request of any party to the arbitration or at the instance of the court, together with all the depositions and documents which may have been taken or proved before them, upon the payment of all fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award.

### **Power of Court to modify, remit, set aside or confirm the award**

The Court may *modify* or correct an award. In the case of modification the court interferes where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred to. Another case where the court modifies is where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision. The third case is where there is clerical error or mistake arising from an accidental slip or omission.

The Court may *remit* an award, that is, send back the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit. An award may be remitted where it has left undermined any of the matters referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred. The other case for remitting an award arises where the award is so indefinite as to be incapable of execution, or where an objection to the legality of the award is apparent upon the face of it.

When the Court remits an award under these circumstances the court shall fix the time within which the arbitrator or umpire shall submit his decision to the court, subject of course, to the extension of the time so fixed by a subsequent order of the court. Where an award is remitted and the arbitrator or umpire fails to reconsider it and submit his decision within the time fixed, it shall become void.

An award may be set aside on the grounds; (a) that an arbitrator or umpire has misconducted himself or the proceedings, (b) that an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid; (c) that an award has been improperly procured or is otherwise invalid.

*Judgment in terms of award.* Where the Court sees no cause to remit or set aside the award or any of the matters referred to arbitration, the court shall, after the time for making an application to set aside the award has expired, or such application having been made, has been refused, proceed to pronounce judgment according to the award. On the judgment so pronounced a *decree* shall follow, and no appeal shall lie from such decree, except on the ground that it is in excess of, or not otherwise in accordance with, the award. The court may, however, pass *interim orders* at any time after the filing of the award whether

notice of the filing has been served or not, on being satisfied by affidavit or otherwise, that the party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or that speedy execution of the award is just and necessary. The person on whom such interim orders have been passed may, of course, show cause against such orders and the Court may, on hearing him, pass such further orders as it deems necessary and just. Where the award is set aside or become void the court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred.

*Interim award and Extension of time* It is to be observed that the arbitrators or umpire may make an interim award, unless the agreement otherwise provides. The same rules of law prevail under an interim award as under a final award.

Where a time for the making of an award is fixed the Court may, if it thinks fit, before or after the expiry of the said time, and whether or not the award has been made, extend from time to time the time for making the award. Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

*Removal of arbitrators* It is also to be noticed that arbitrators cannot be removed except with the leave of the court, unless the parties had reserved the right of revoking the authority of the arbitrators. The court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award, or who has misconducted himself or the proceedings.

Where the authority of an arbitrator or arbit-



rators or an umpire is revoked by leave of the court, or where the court removes an umpire who has entered on the reference, or a sole arbitrator or all the arbitrators, the court may, on the application of any party to the arbitration agreement, either -

(a) appoint a person to act as sole arbitrator in the place of the person or persons displaced; or

(b) order that the arbitration agreement shall cease to have effect with respect to the difference referred.

*Effect of submission or reference to arbitration :*  
When any person enters into an agreement with another to refer all disputes between them either existing or future, to arbitration, he cannot institute any suit in a court of law relating to those disputes; otherwise the very purpose of arbitration will be frustrated.

If he institutes any such proceedings against the other party, the latter can apply to the court before which the proceedings are pending to stay the proceedings and the court will grant an order staying such suit or proceeding, provided the following conditions are satisfied :

(1) That the suit or proceeding is in respect of the matter agreed to be referred to arbitration. If the subject-matter of the suit falls outside the scope of the submission the court will not stay the suit. If however, the suit relates to matters which are partly within the submission and partly not covered by the submission, it depends on the discretion of the court to grant a stay order or not.

(2) That the applicant was and still remains ready and willing to do all things necessary for the proper conduct of the arbitration.

(3) That there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement.

(4) That the party instituting the suit was

not induced to enter the arbitration agreement by fraud.

(5) That the party asking for the stay order has not filed a written statement by way of defence in the suitsought to be stayed, or taken any other steps in the proceedings. The following have been held to be steps in the proceedings which debar a defendant to a suit from procuring a stay order on the strength of an arbitration agreement (a) An application for stay of suit coupled with an order for security from the plaintiff, (b) an application for further time to file the written statement; (c) an application for leave to administer interrogatories, *i e* questions to the other party, (d) submitting to the jurisdiction of the court

If the court is satisfied that the matter should be decided by arbitration, it stays the suit or proceeding. It does not dismiss the suit, for in case the award is remitted or set aside the stayed suit can be heard without the necessity of instituting it all over again.

### **Arbitration through intervention of court.**

Two cases arise. (1) where there is no suit pending, (2) where there is a suit.

(1) Where parties have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement and a difference has arisen to which the agreement applies, they may, instead of proceeding as in the case of a reference out of court, apply to the court having jurisdiction in the matter, that the agreement be filed. The application has to be in writing and the court, after giving notice to all the parties, may order the agreement to be filed after hearing them and shall make an order of reference to the arbitrator or arbitrators appointed by the parties either in the agreement or otherwise, or where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the court.

The proceedings will then be as before.

Where there is a difference or dispute as to the arbitrator's remuneration or costs, or where any arbitrator refuses to deliver the award except on payment of the fees demanded by him, the court may, on application of the parties, order the delivery of the award on payment of the fee demanded by the arbitrator to the court and thereafter may order what sum, if any, out of the said amount should be paid to the arbitrator or umpire, which to the court seems reasonable.

(2) After the parties have filed a suit in a civil court in connection with any difference between them, they may, before judgment is pronounced, apply in writing to the court for an order of reference in which case the arbitrator shall be appointed in such a manner as may be agreed upon between the parties. The court by order may refer to the arbitrator the matter in reference and shall in the order specify such terms which the court thinks reasonable for the making of the award. Once the matter is referred to arbitration the Court shall not deal with such matter, except as allowed by the Arbitration Act, 1940. Where some of the parties to the suit wish to refer the matter to arbitration and the others do not, the court may, provided the matter in which the parties are interested can be separated from the subject-matter of the suit, refer it to arbitration. But the suit shall continue so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference as if no such application has been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application.

#### **Statutory arbitration.**

Arbitration is enjoined by certain statutes. For instance, the Co-operative Societies Act lays down that certain disputes between a member and a Co-operative Society must be settled by arbitration



## CHAPTER XV

# INSOLVENCY

### **Insolvency law.**

When a person gets so encumbered that his debts far exceed his assets, it is to the interest of the state that all his creditors get paid proportionately out of his assets and that he be allowed to get a fresh start in life. In such a case, therefore, the Law of Insolvency allows the person to be adjudged an insolvent, the effect of which is, briefly, to relieve him of all liabilities and to distribute his assets most equitably for the benefit of the creditors.

The Insolvency Law in India is covered by two Acts, viz (1) the Presidency Towns Insolvency Act of 1909, and (2) the Provincial Insolvency Act of 1920.

### **PRESIDENCY TOWNS INSOLVENCY ACT.**

#### **Who can be made an insolvent**

Any person of full age and sound mind may be declared an insolvent under the circumstances explained below.

*Minor.* All agreements by a *minor* excepting agreements relating to the purchase and sale of necessaries and those for the benefit of the minors, are absolutely void. Even in the case of necessaries the minor incurs no personal liability. Further a minor cannot even ratify agreements executed during his attainment of majority. A *minor* therefore cannot be adjudged an insolvent, and if a minor is adjudged an insolvent, the adjudication must be annulled.

As already observed, a minor cannot become a partner but he may be admitted to the benefits of a partnership, in which case his share in a partnership assets is liable for the debts of the firm. Where a firm consists of adult and minor partners, only the adult partners can be adjudged insolvent and not the minor partners. If in the insolvency petition order of adjudication is sought against the firm itself, it will not be made against the firm, but it will be made against the partners of the firm other than the minor partners. In any case, on the making of the order of adjudication, all the properties and assets of the firm including the minor's share will vest in the official Assignee or the Receiver.

*Married Woman* A married woman may be adjudged insolvent in connection with her contract binding her separate estates, because marriage does not qualify either a Hindu, Mohammadan, Parsi, European, or of any other religion, from entering into a contract.

*Lunatic* A lunatic cannot commit an act of insolvency which involves intent such as a transfer of his property with the intent to defeat his creditors, or departure from his dwelling house, with similar intent. But a lunatic can be adjudged insolvent on a debt contracted or an act of insolvency committed prior to lunacy. A lunatic may be adjudged insolvent with the consent of the court of Lunacy under the direction of the committee.

*Partners* A creditor may present an insolvency petition against any partner of a firm separately, without including the others. He may also present a joint petition against two or more of them provided both or all have committed an act or acts of insolvency. But a single petition may be founded on a joint act of insolvency provided the joint act is the act of each one.

*Joint Debtors* If two or more persons contract a joint debt and the joint debt is not satisfied by

either or both of them, the creditor may present a single insolvency petition against the joint debtors provided they have each committed some act of insolvency. The act of insolvency may be a joint act provided it is shown to be the act of all.

*Joint Hindu Family:* A joint Hindu family cannot be adjudged insolvent as such. But the members of a joint Hindu family may be adjudged insolvent on a single petition by a creditor provided they are personally liable on a joint debt and have committed a joint act of insolvency e.g., by jointly transferring family property in favour of a creditor by way of fraudulent preference. Where the business of a joint Hindu family is carried on by the manager of the family and debts are contracted by him, in the course of business, the shares of the other members in the family business only are liable for such debts and they are not personally liable for the same. Therefore, they can never be adjudged insolvent on such debts. In no case can a minor be adjudged insolvent.

*Companies:* Registered companies can never be adjudged insolvent under the Insolvency Acts. In case the creditors of the company desire to have the company adjudged insolvent, they should proceed under the winding up provisions of the Indian Companies Act, 1913.

*Foreigner:* With regard to a foreigner, if he is trading within the jurisdiction of the Act and has been domiciled here, he can be adjudged insolvent like a British subject trading within the jurisdiction of the Act.

### Acts of insolvency:

The acts of insolvency are :

(a) If, in British India or elsewhere, he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally.

(b) if, in British India or elsewhere, he makes

a transfer of his property or of any part thereof with intent to defeat or delay his creditors,

(c) if, in British India or elsewhere, he makes a transfer of his property or of any part thereof which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent,

(d) if, with intent to defeat or delay his creditors,

(i) he departs or remains out of British India,

(ii) he departs from his dwelling-house or usual place of business or otherwise absents himself,

(iii) he secludes himself so as to deprive his creditors of the means of communicating with him,

(e) if any of his property has been sold or attached for a period of not less than twenty-one days in execution of the decree of any court for the payment of money,

(f) if he petitions to be adjudged an insolvent,

(g) if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts,

(h) if he is imprisoned in execution of the decree of any court for the payment of money

### Procedure

*Petition for insolvency* Proceedings in insolvency commence with the presentation of a petition. The petition may be presented either by (1) the insolvent himself, or (2) by a creditor or creditors, and the court may on such a petition make an order of adjudication by which the debtor is adjudicated an insolvent.

The court has jurisdiction to make this order only where the debtor is, at the time of the presentation of the insolvency petition, either imprisoned in execution of the decree of a court for non-payment of money, in any prison to which debtors are ordinarily committed by the court in the exercise of its ordinary



original jurisdiction, or where within a year before the date of the presentation of the insolvency petition, the debtor has ordinarily resided, or had a dwelling-house, or has carried on business in person, or through his agent, within the limits of the ordinary original civil jurisdiction of the court, or where the debtor personally works for gain within those limits. In the case of petitions by or against a firm of debtors, the firm should have carried on business within a year prior to the date of presentation of the insolvency petition within those limits

*Creditor's qualification:* With regard to a creditors' petition, it is provided that the debt owing to the creditor or creditors, singly or jointly, must amount to at least Rs. 500 in the aggregate, which should be a *liquidated sum* payable immediately or at some future time and the act of insolvency on which the petition is based should have occurred within three months immediately prior to the presentation of the petition.

*Debtor's qualification:* A debtor shall not be entitled to present an insolvency petition, unless —(a) his debts amount to five hundred rupees, or (b) he has been arrested and imprisoned in execution of the decree of any court for the non-payment of money, or (c) an order of attachment in execution of such a decree has been made and is subsisting against this property.

*Effect of order of adjudication:* The effect of the order of adjudication is that all the property of the insolvent vests in the official assignee for the benefit of the creditors and of the debtor. After such an order, no creditor of the insolvent can bring any suit without the leave of the court nor can he have any remedy against the property of the insolvent during the pendency of the insolvency, so long as the creditor's debt is provable in insolvency. This rule, however, does not prevent a subsequent creditor from realizing or otherwise dealing with his security.

*The protection order:* A protection order is an

order of the court by which the insolvent is protected from being arrested or detained in prison for any debt to which the order shall apply and in case the insolvent is already under arrest or detention he may be entitled to be released. The court may, at its discretion, make the protection order even before the insolvent has submitted his schedule, if it thinks necessary to do so in the interests of the creditors.

*Protected transactions* If any of the following transactions take place before the date of the order of adjudication, and if the person, before such transactions takes place, has not, at the time, notice of the presentation of any insolvency petition by or against the debtor, he will be protected. These transactions are (1) Any payment by an insolvent to any of his creditors, (2) any payment or delivery to the instalment, (3) any transfers by the insolvent for valuable consideration, and (4) any contract or dealing by or with the insolvent for valuable consideration. Of course, in all these cases the payment or delivery, must be *bona fide*, in the ordinary course of business.

*The Insolvent's schedule* The insolvent debtor is required to prepare a schedule within 30 days of the order of adjudication, if passed on the petition of the debtor himself, or within 30 days from the date of service of the order if made on the petition of a creditor. The schedule must be prepared in the prescribed form, and if the debtor fails to prepare it he is liable to be committed to civil prison. After the submission of the schedule the insolvent may apply to the court for protection and the court may then grant him a *Protection Order* on production of a certificate signed by the official assignee to the effect that he has so far conformed to the provisions of the Insolvency Act.

*Composition or Schemes of Arrangement* After an adjudication order is made, an insolvent may propose a scheme of composition, or submit a proposal for a scheme of arrangement which scheme shall be

submitted by the official Assignee to a meeting of creditors. A copy of the scheme or proposal is to be sent to each creditor mentioned in the schedule or to those who have tendered a proof of their claim before the meeting. and if on consideration of the debtor's proposal the *majority in number and three-fourths in value* of all the creditors resolve to accept the proposal, the scheme shall be taken to have been duly accepted by the creditors. Any creditor may communicate his decision by a letter addressed to the official assignee to reach him before the day of the meeting. The official Assignee should then apply to the court to approve the scheme, notifying all the creditors of the time and day on which such an application is to be made. The court on hearing all concerned will accept or approve the scheme or reject it where the court finds that certain circumstances have transpired which compel the court to refuse the insolvent's discharge, or to suspend or attach conditions to it, the court will refuse to approve the proposal unless at least four annas in the rupee, on all the unsecured debts against the debtor's estate are provided for by securities. On approving the scheme, the court will make an order annulling adjudication. On such an approval the composition scheme shall be binding on all creditors, so far as it relates to debts due to them from the insolvent which are provable in insolvency.

*Annulment by court:* The composition or scheme of arrangement may be annulled by the court on any of the following grounds: (1) where any instalment due on the scheme is not paid; or (2) where the court is of opinion that the scheme cannot proceed without injustice or undue delay; or (3) if the court finds that its approval was obtained by fraud.

The effect of such an order is that the debtor is readjudged insolvent and his property once again-vests in the official assignee, but, of course, without prejudice to the validity of any transfer or payment duly made

in pursuance of the composition or the scheme All debts provable in other respects which have been contracted before the date of such readjudication shall be provable in insolvency

It is to be observed that the approval of the composition scheme will not be binding on any creditor whose debt is of such a nature as would not be discharged by an order of discharge

*Debts not wiped off by Discharge or Composition*  
The following debts do not discharge an insolvent either by an order of discharge or by the approval of the composition or scheme by the court- (a) any debt due to the Crown, (b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which the debtor was a party, (c) any debt or liability in respect of which the debtor has obtained forbearance by any fraud to which he was party, or (d) any liability under an order for maintenance made under section 488 of the Code of Civil Procedure, 1898

*Debtor's property* "Debtor's property" includes any property over which or over the profits of which any person has a disposing power which he may exercise for his own benefit It shall *not include* any property possessed by the insolvent on trust for any other person or tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessels, and furniture of himself, his wife and children, to a value, inclusive of tools and apparel and other necessities as aforesaid, not exceeding three hundred rupees in the whole Where any part of the property of the insolvent consists of stock, shares in ships, shares or any other property transferable in the book of the company, the official assignee may exercise the right to transfer the property in the same manner as the insolvent may have done. Besides this, all the property of the insolvent which consists of things in action shall also be deemed to have been duly transferred to the official assignee Also any banker, agent, or attorney of the insolvent

or any other officer who may have any money or securities in his possession belonging to the insolvent shall hand them over to the official assignee unless he has by law the power to retain them against the official assignee. If he fails to do so he shall be guilty of a contempt of court. The court has also power to grant a warrant for the searching of any building or room where any property belonging to the insolvent is supposed to be concealed.

With regard to an officer of the Army and Navy, or of his Majesty's Royal Indian Marine Service, or in the Civil Service of the Crown, the official receiver has the right to receive for distribution among creditors so much of the insolvent's pay or salary which is liable to attachment in execution of a decree as the court may direct

The doctrine of *reputed ownership* also applies to traders. Thus not only the goods actually belonging to the insolvent trader, but also those which happen to be under his "order and disposition" vest in the official assignee or trustee in bankruptcy.

The property *acquired by the insolvent after adjudication* also vests in the official assignee, but not unless and until this officer intervenes on behalf of the insolvent's estate. If he does not intervene and meanwhile the insolvent transfers his property to another who takes it in good faith and for value, the transferee, acquires a good title to it.

Debtor's *property in a Foreign State* (which includes a Native State) is not included in the property which vests in the official assignee.

In the case of *onerous property*, that is shares and stocks in companies which are burdened with onerous condition, unprofitable contracts, or any other property which is unsaleable or not readily saleable because of its binding the possessor to the performance of any onerous action or to the payment of any sum of money, the official assignee is given the option

to disclaim and return it within twelve months after the adjudication of the insolvent. This power of disclaimer may be exercised by the official assignee notwithstanding the fact that he may have endeavoured to sell or may have taken possession of the property or may have exercised any act of ownership in relation thereto. If, however, an application in the property requiring him to decide whether he will disclaim, and the official assignee has declined or neglected to give notice that he disclaims within twenty-eight days after the receipt of application or such extended period as may be allowed by the court the official assignee shall not be entitled to disclaim the property thereafter and he shall be taken to have adopted it. In the case of *lease-hold property*, the official assignee is not entitled to disclaim without the leave of the court.

Any person injured by the operation of a disclaimer will be deemed to be a creditor of the insolvent to the extent of the amount of the injury, and may prove it as a debt under the insolvency.

*Distribution of property* The official assignee has to declare and distribute the dividends among creditors who have proved their debts with all convenient speed. The first dividend (if any) shall be declared and distributed within six months after the adjudication, unless there is a good cause for postponing the declaration. The subsequent dividends unless there is a sufficient reason to the contrary, must be declared and be payable at intervals of not more than six months.

In calculation and distribution of dividends, the official assignee must retain in his hands sufficient assets to meet. (a) debts provable in insolvency and appearing from the insolvent's statement or otherwise to be due to persons resident in places so distant that in the ordinary course of communication they have not sufficient time to tender their proofs, (b) debts provable in insolvency the subject of claims not yet

determined, (c) disputed proofs of claims; and (d) the expenses necessary for the administration of the estate or otherwise.

If it happens that any creditor has not proved his debt before the declaration of the dividend, that creditor shall be entitled to be paid out of any money which happens to be in the hands of the official assignee before it is applied to the payment of any further dividend. After all the assets have been realized, or at least so much of them as can be realized without needlessly protracting the proceedings in insolvency, the official receiver shall, with the leave of the court, declare a final dividend. Before doing so, however, he must send notice to the persons who claim to be the creditors, but who have not proved their claims, inviting them to do so with a notice that if they do not prove the same within the time limited by the notice he would proceed to make the final dividend without regard to their claims. After this, the property of the insolvent must be divided among the creditors who have proved their debts, without regard to the claims of any other persons. If, after the payment of all the claims in full with interest and expenses, there remains a balance, the insolvent is entitled to such a balance.

*Effect of insolvency on antecedent transactions.* All *bonafide* transactions entered into by the insolvent prior to his insolvency are generally speaking protected, provided that such transactions had taken place before the date of the order of adjudication and that the person with whom such transactions have taken place had not, at the time, notice of the presentation of any insolvency petition by or against the debtor. Such transactions are, (1) any payment by the insolvent to any of his creditors which does not fall under the heading of fraudulent preference; (2) any payment or delivery to the insolvent *bona fide*; (3) any contract or dealing by or with the insolvent for valuable consideration.

*Execution creditors* Where a creditor has obtained a decree of execution against the property of a debtor he is not entitled to retain this against the official assignee unless he has realized the assets in the course of the execution by sale or otherwise before the date of the order of adjudication and before he had notice of the presentation of the insolvency petition by or against the debtor. Otherwise any creditor or any one interested may give notice of adjudication to the court which is executing the decree, and on receipt of such a notice, the court must direct that the property may be delivered to the official assignee if it still be in the possession of the court. The cost of execution will be a *first charge* on the property so delivered and the official assignee shall have to satisfy the charge. If, however, the property has been sold under execution, any person who buys the same in good faith would acquire a good title against the official assignee.

*Preferential debts.* In the distribution of the property of the insolvent the following debts shall be paid *in priority* to all other debts and shall rank equally between themselves and must be paid in full, unless the property of the insolvent is insufficient to meet them, in which case they shall abate in equal proportions between themselves, (a) all debts due to the Crown or to any local authority, (b) all salary or wages of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition, not exceeding Rs 300 for each such clerk, and Rs 100 for each such servant or labourer, and (c) rent due to a landlord from the insolvent provided the amount payable shall not exceed one month's rent.

*Any fraudulent preference shall be void*

*Set-Off* Where there have been mutual dealings between an insolvent and a creditor, an account is to be taken of what is due from one party to the other



in respect of such mutual dealings, and the sum due from one party must be set-off against any sum due from the other party and the balance of the account shall be claimed or paid on either side. The person claiming the set-off against an insolvent's property should not have had notice of the presentation of the insolvency petition against the debtor at the time of giving credit, otherwise he would not be entitled to claim such a set-off,

*Partnership property:* In the case of partners the partnership property is applicable, in the first instance, in payment of the partnership debts and the separate property of each of the partners is applicable for the payment of their separate debts. Any surplus of either of the properties shall be dealt with as part of the other property, i.e. surplus out of private property, after paying private debts, shall be dealt with as a part of the partnership property and *vice versa*.

*Discharge of the insolvent.* The insolvent can at any date, after the order of adjudication and after his public examination, apply to the court to fix a date for the hearing of the application for discharge. After public examination and after hearing the application for discharge, the court may either (a) grant or refuse the discharge; or (b) suspend the operation of the order for a specified time; or (c) grant an order of discharge subject to conditions with respect to any earning or income which may afterwards become due to the insolvent or with respect to his after-acquired property

The court *must* refuse the discharge in all cases where the insolvent has committed any offence under the Insolvency Act or under sections 421 to 424 of the Indian Penal Code. Where the insolvent's assets are not of a value equal to four annas in the rupee on the amount of his unsecured liabilities, the court may either refuse the discharge, or suspend it for a specified time or until a dividend of not less than four annas in

the rupee has been paid, unless the court is satisfied that the fact that the assets are not of such value has arisen from circumstances for which the insolvent cannot justly be held responsible. The court *may*, under the same circumstances, discharge the insolvent on his consenting to a decree being passed against him in favour of the official assignee for any balance, or part thereof, provable under the insolvency which is not satisfied at the date of his discharge to be paid by him out of his future earnings or after-acquired property. The same rule would apply where the insolvent has omitted to keep proper books of account, or has contracted any debt provable in insolvency without having at the time any reasonable or probable ground of expectation that he would be able to pay it, or where the insolvency has been brought about by rash and hazardous speculation or by unjustifiable extravagance or by gambling, or, by culpable neglect of his business affairs, or under similar other circumstances.

## PROVINCIAL INSOLVENCY ACT, 1920

### **Jurisdiction**

The Provincial Insolvency Act, 1920, extends to British India as administered by courts having jurisdiction outside the Presidency Towns and the towns of Karachi and Rangoon. The Courts outside the Presidency Towns which administer jurisdiction under this Act are the District Courts, unless the Provincial Government by notification in the Official Gazette invests any court subordinate to a District Court with jurisdiction in any classes of cases, and any court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act.

### **Acts of insolvency.**

The acts of insolvency under this Act are the

same as in the case of the Presidency Towns Insolvency Act:

### **Application for adjudication.**

Where a debtor commits one of the acts of insolvency referred to above, a petition may be presented for his adjudication in insolvency, either by his creditor or by the debtor himself. A creditor is not entitled to present an insolvency petition, unless the debt owing to the creditor or jointly to creditors, where two or more creditors join in the petition, come to the aggregate amount of not less than Rs. 500, and is a debt in a liquidated sum either payable immediately or at some future time and the act of insolvency should have been committed within three months before the presentation of the petition. There is, of course, no objection to present a petition on the same day as on that on which the act of insolvency was committed.

A debtor is not entitled to present a petition unless he is unable to pay his debts which amount to Rs 500 or more; or if he is under arrest or imprisonment in execution of the decree of any court for the payment of money, or an order of attachment in execution of such a decree has been made, and is subsisting, against his property.

Once a petition is presented it cannot be withdrawn without the leave of the court. However, if two or more insolvency petitions are presented against the same debtor or where petitions are presented against joint debtors, the court may consolidate the proceedings or any of them, as the court think fit. Should the debtor against whom the petition has been presented die, the court may continue the proceedings so far as may be necessary for the realization and distribution of the property of the debtor .

Joint stock companies or corporations which are formed under any enactment for the time being in force, cannot be petitioned in an insolvency court,

## Procedure

The court may appoint an interim receiver and while admitting the insolvency petition it *may*, where the petition is by a creditor, and *shall*, if it is by the debtor, appoint a receiver of the property of the debtor, who may be directed to take immediate possession of the property. The receiver has the usual powers of a receiver under the Civil Procedure Code.

*Interim proceedings against the debtor.* At the time of making the order admitting the petition or at any subsequent date prior to adjudication, the court may either of its own motion or on the application of any creditor (1) order the debtor to give reasonable security for his appearance until final orders are made upon the petition, and in case of default of giving such security he shall be detained in the civil prison, (2) order the attachment by actual seizure of the whole or any part of the property in the possession or under the control of the debtor, other than such particulars (not being his books of account) as are exempted by the Civil Procedure Code, or by any other enactment, (3) order a warrant to issue, with or without bail, for arrest of the debtor, ordering either that he should be detained in a civil jail or be released on such terms as to security as may be reasonable and necessary.

The order under clauses (2) and (3) shall not be made unless the Court is satisfied that the debtor, with intent to defeat or delay his creditors or to avoid any process of the court, has absconded or has departed from the local limits of the jurisdiction of the court, or is about to do so; or where the debtor has failed to disclose or has concealed, destroyed, transferred or removed from such local limits, or is about to do so, any documents likely to be of use to his creditors in the course of the hearing, or any part of his property.

The debtor must, during the interim proceedings, produce all books of accounts and give such inven-

tories of his property and lists of his creditors and debtors and of the debts due to and from them as may be required. He must also submit himself to such examination in respect of his property or his creditors and attend on due dates and times appointed by the Court before the Court or Receiver, execute instruments and generally do all such acts in relation to his property as he may be required to do by the Court or the Receiver.

*Hearing of the petition and order of adjudication :* After hearing the petition on the date appointed for the purpose, if the Court is not satisfied with the proof, it shall dismiss the petition, and may even award compensation to the debtor in case of the creditor's petition if it is satisfied that the petition was frivolous or vexatious, not exceeding Rs. 1,000. If the Court is satisfied as to the proofs produced, an order of adjudication shall be made in which the Court must specify the period during which the debtor must apply for his discharge. This period may be extended at the discretion of the court. The *effect* of the adjudication order is that the whole of the property of the debtor vests in the court or the official receiver and becomes divisible among creditors. Under this Act also an order of adjudication relates back to and takes effect from the date of the presentation of the petition on which it is made.

*Schedule of creditors* After the adjudication order all persons who claim to be creditors of the insolvent have to tender proof of their respective debts as to the amount and particulars thereof, and the court after hearing all of them shall prepare a schedule of creditors and their claims. In the case of any debt, the value of which is incapable of being proved and ascertained in the opinion of the court, the same shall not be included in the schedule. This schedule shall be posted in the court-house.

*Annulment by the Court .* Where the Court

thinks that the debtor ought not to have been adjudged an insolvent or that the insolvency debts have been paid up in full, the court, on application by the debtor, or any other person interested, annul the adjudication.

*Composition and schemes of arrangement.* After the making of the order of adjudication, a debtor may submit a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, and if it is accepted at the creditors' meeting by a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader, it is deemed to be duly accepted by the creditors. If the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors the court may refuse to approve the proposal.

*Debts not wiped off by discharge or composition.* The debts which are not wiped off by discharge or composition are the same as in the case of Presidency Towns Insolvency Act.

*Order of discharge.* An insolvent may apply for his discharge at any time after his adjudication and the court after the hearing of the application on a day fixed for the purpose and after due notice may pass any of the following three orders: (1) Grant or refuse an absolute order of discharge, or (2) suspend the operation of the order for a specified time, or (3) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property.

The court *must* grant an absolute order of discharge if it is proved that —

(1) the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, unless it is shown by the insol-

vent that his position has risen from circumstances for which he cannot justly be held responsible;

(2) the insolvent has omitted to keep books of account as are usual and proper in the business carried on by him with a view to sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency;

(3) the insolvent has contracted any debt provable under this Act without having at the time of doing so any reasonable or probable ground or expectation that he would be able to pay it;

(4) he has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities,

(5) the insolvent has brought on, or contributed to his insolvency by rash speculation, or unjustifiable extravagance in living, or gambling, or culpable negligence of his business affairs;

(6) the insolvent has within three months preceding the date of the presentation of the petition given an undue preference to any of his creditors;

(7) the insolvent on any previous occasion has been adjudged an insolvent or has made a composition or arrangement with his creditors;

(8) he has concealed or removed his property or any part thereof or has been guilty of any other fraud or fraudulent breach of trust.

*Powers and duties of the Official Receiver* : The powers and duties of a receiver so appointed are that —

(1) he can sell all or part of the property of the insolvent,

(2) give receipts for any money received by him; and with the consent of the Court may :—

(a) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same;

(b) institute, defend or continue any suit or other legal proceedings relating to the property of the insolvent and for that purpose employ a pleader or other agent to take any proceedings or do any business which may be sanctioned by the Court,

(c) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time subject to such stipulations as to security as the Court may think fit;

(d) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts,

(e) refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon,

(f) divide in its existing form amongst the creditors, according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot be readily or advantageously be sold

*Priority of debts* In the payment of debts while distributing the debtor's property, after all secured creditors have been paid out of their securities, the following shall have priority, viz, —

(1) all debts due to the Crown or to any local authority, and

(2) all salary or wages, not exceeding Rs 20 in all, of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition. These debts will rank in priority between themselves, unless the property of the insolvent is insufficient to meet them, in which case they shall be paid in equal proportions between themselves. In case of partners, the partnership property shall be applicable in the first instance in payment of the partnership debts. Where there is surplus of separate property of the partners,



it shall be dealt with as part of the partnership property; and where there is a surplus of a partnership property, it shall be dealt with as part of the respective separate property in proportion to the rights and interests of each partner in the partnership property. If all the debts are paid off and a surplus remains, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of 6 percent per annum on all debts entered in the schedule. If after payment of all debts there is a surplus, the surplus of course, belongs to the insolvent.

Other matters dealt with are the same as in the Presidency Towns Insolvency Act

## CHAPTER XVI

# INCOME-TAX

### **Income-tax.**

A tax is a "compulsory contribution of the wealth of a person or body of persons, for the service of the public powers" Income-tax, as its name implies, is a tax on Income The law does not define Income, though it sets out certain provisions as to particular kinds of receipts that should be excluded or included and as to the methods of computing income

The body of the Law is contained in the Income-tax Act, XI of 1922, as amended up to date. The Act relates to both Income-tax and Super-tax. The rates of Income-tax and Super-tax are prescribed by the annual Finance Act

### **Assessee.**

"Assessee" means a person by whom income-tax is payable Income-tax includes super-tax which is "an additional duty of income-tax". The word "person" would include any company or association or body of individuals whether incorporated or not and also a Hindu undivided family and a local authority The executor, administrator, or other legal representative of a deceased person is treated for the purposes of an assessment on the income of such deceased person as an assessee If any person who is required to deduct tax at source under section 18 of the Act, does not deduct or after deducting fails to pay it, he will be deemed to be an assessee in default in respect of such tax.

Assessees fall under three classes viz:—

1. persons resident and ordinarily resident in British India :
2. persons resident but not ordinarily resident in British India : and
3. persons not resident in British India.

*Persons resident and ordinarily resident in British India :* Such persons are chargeable :

(a) on all income accruing or arising or deemed to accrue or arise in British India in the *previous year*.

(b) on all income received or deemed to be received in British India in the *previous year* irrespective of whether it accrued or arose within or without British India:

(c) on all income accruing or arising without British India (except any income accruing or arising in an Indian State which is to be included in total income for purposes of determining the average rate of tax, but is otherwise exempt) in the *previous year* even though it is not brought into British India : and

(d) on all amounts brought into British India during the previous year out of income which accrued before the beginning of such year and after the 1st of April 1933.

*Persons not resident in British India :* Such persons are chargeable—

(a) on all income accruing or arising or deemed to accrue or arise in British India in the *previous year* ;

(b) on all income received or deemed to be received in British India during the previous year irrespective of whether it accrued or arose within or without British India :

(c) on such amount of income, profits or gains which accrued or arose without British India (excluding income from business accruing or arising in an

Indian State which is to be included in total income but is otherwise exempt) in the *previous year* as is derived from a business, controlled in or profession or vocation set up in India (including the Indian States) or as is brought into British India during the *previous year*, and

(d) on all amounts brought into British India during the *previous year* out of income which accrued before the beginning of such year and after the 1st day of April 1933.

*Persons not resident in British India* : Such persons are chargeable—

(a) on all income accruing or arising or deemed to accrue or arise in British India during the *previous year*, and

(b) on all income received or deemed to be received in British India during the *previous year*

Under an important *proviso* a sum of Rs 4,500 is to be deducted from the income arising abroad in the previous year, but not brought into British India *This proviso is applicable to persons resident in British India whether they are ordinarily resident or not.*

*Income from agriculture* arising or accruing outside British India is not exempt from tax but such income accruing or arising in an Indian State is liable only if it is received or brought into British India by or on behalf of the assessee who is resident. In the case of a person who is also ordinarily resident it is to be included in his 'total income' but is otherwise exempt. In the case of a person not resident in British India, it is to be included in his 'total world income.'

*Residence in British India* . For the purposes of this Act—

(a) any individual is resident in British India in any year if he—

(i) is in British India in that year for period amounting in all to 182 days or more ; or

(ii) maintains or has maintained for him a dwelling house in British India for a period amounting in all to 182 days or more in that year, and is in British India for any time in that year ; or

(iii) having within the four years preceding that year been in British India for a period of or for periods amounting in all to 365 days or more, is in British India for any time in that year otherwise than on an occasional or casual visit ; or

(iv) is in British India for any time in that year and the Income-tax Officer is satisfied that such individual having arrived in British India during that year is likely to remain in British India for not less than three years from the date of his arrival ,

(b) a Hindu undivided family, firm or other association of persons is resident in British India unless the control and management of its affairs is situated wholly without British India ; and

(c) a company is resident in British India in any year (a) if the control and management of its affairs is situated wholly in British India in that year, or (b) if its income arising in British India in that year exceeds its income arising without British India in that year.

*Ordinary residence* . For the above purpose-

(a) an individual is 'not ordinarily resident' in British India in any year if he has not been resident in British India in nine out of the ten years preceding that year or if he has not during the seven years preceding that year been in British India for a period of, or for periods amounting in all to, more than two years ,

(b) a Hindu undivided family is deemed to be ordinarily resident in British India if its manager is ordinarily resident in British India ;

(c) a company, firm or other association of persons is ordinarily resident in British India if it is resident in British India.

**Previous year.**

"Previous year" means in respect of any separate source of income, profits and gains-

(a) the twelve months ending on the 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st day of March, then at the option of the lessee the year ending on the day to which his accounts have so been made up *provided* that where an assessee has been assessed in respect of a particular source of income, profits and gains, he shall not in respect of that source exercise this option, so as to vary the meaning of the expression 'previous year' as then applicable to him except with the consent of the Income-tax Officer and upon such conditions as the Income-tax Officer may think fit, or

(b) in the case of any person, business or company or class of person, business or company, such period as may be determined by the Central Board of Revenue or by such authority as the Board may authorise in this behalf, or

(c) where a business, profession or vocation has been *newly set up* in the financial year preceding the year for which assessment is to be made, the period from the date of the setting up of the business, profession or vocation to the 31st day of March next following or to the last day of the period determined under clause (b) above, or, if the accounts of the assessee are made up to some other date than the 31st day of March and the case is not one for which a period has been determined by the Central Board of Revenue under clause (b) above, then at the option of the assessee, the period from the date of the setting up of the business, profession or vocation to such other date:

*Provided* that when such other date does not fall between the setting up of the business, profession

or vocation and the next following 31st day of March, it shall be deemed that there is no previous year, and

When the assessee is a *partner* in a firm, 'previous year' in respect of his share of the income, profits and gains of the firm means the previous year as determined for the assessment of the income, profits and gains of the firm.

Thus, if a business is set up on the 1st day of June, 1939, and the accounts are made up to the 31st day of May 1940, the assessee can elect to have the year ended 31st May as his "previous year", and in such circumstances there will be deemed to have been no previous year for assessment for the year 1940-41, the profits for the year ended 31st May 1940 being taken as profits of the 'previous year' for assessment for the year 1941-42. If, however, an assessee sets up a business on the 1st June 1939 and makes up his accounts up to the 31st December then, if he elects to have the year ended 31st December taken as his "previous year" for this source of income the profits of the period 1st June 1939 to 31st December 1939 will be taken as the profits of the "previous year" for assessment for the year 1940-41. If the assessee makes up his first accounts for the whole period from 1st June 1939 to 31st December 1940, however, as the date 31st December falls between 1st June and 31st March, the *proviso* does operate and there is a "previous year," for the assessment for 1940-41. If the assessee makes no election, the "previous year" for assessment for the year 1940-41 will be the period from 1st June 1939 to 31st March 1940.

In the case of those *Insurance Companies* and *Provident Societies* which have to change their accounting year to the calendar year in order to comply with the requirement of sub-section (1) of section 11, or sub-section (3) of section 82 of the Insurance Act, 1938, the Central Board of Revenue has determined the following period as the "previous year" for the pur-

poses of the assessment for the financial year commencing next after the year for which the assessment was made on the basis of a previous year other than the Calendar year, namely :—

(a) In the case of Companies whose accounting year ends on any date between the 1st January and the 31st March (both days inclusive) The period from the end of their previous accounting year to the end of the calendar year in which the change is made

(b) In the case of Companies whose accounting year ends on any date between the 1st April and the 31st December (both days inclusive) The period from the end of the accounting year for the next previous assessment to the end of the calendar year for which the assessment is to be made

### **Basis of taxation**

The tax is levied for each financial year on the total income of the 'previous year' also called the "*accounting year*" at the rate or rates fixed for the year by the annual Finance Act passed by the Central Legislature. It is the Finance Act which makes the Income-tax operative. The relevant extracts from the Indian Finance Act, 1947, will be found reproduced later in this chapter.

### **Income chargeable to income-tax**

The following heads of income, profits and gains are chargeable to income-tax (i) Salaries, (ii) Interest on securities, (iii) Income from property, (iv) Profits and gains of business, profession or vocation, (v) Income from other sources, (vi) Capital gains

**Salaries** The tax is payable by an assessee under the head "Salaries" in respect of any salary or wages, any annuity, pension or gratuity, and any fees-commissions, perquisites or profits in lieu of, or in addition to any salary or wages, which are due to him from, whether paid or not, or are paid by or on behalf of, the Crown, a local authority, a company, or any other public body or association, or any private employer. An



*advance* of salary is deemed to be salary due on the date the advance is received. It must be distinguished from other advances such as house building-advances which are of the nature of loans. The portion of salary withheld under an order of the court is liable to tax.

✓*Exemption:* (1) ✓No tax is payable in respect of any sum which the assessee by the conditions of his employment is required to spend out of his remuneration wholly, necessarily and exclusively in the performance of his duties, as for instance, where an Executive engineer in the Public Works Department is required to maintain a motor car. If it is a definite sum that is agreed upon under the terms of service, the whole of it is exempted from tax and it is not required to prove that the whole of it was spent. If on the other hand, the sum is not fixed in the contract, it is only such sum as is actually spent that would be allowable as a deduction. ✓But the expenditure must be incurred in the performance of it. Thus expenses of the upkeep of a motor car to convey a pilot between the aerodrome where he is employed and his home is not deductible. Nor are travelling charges of the directors of a company from their residence to the company's office. ✓

Personal allowances or compensating allowances for increase in the cost of living etc. would be taxable. Expenses incurred by a person in putting himself in a position to perform his duties, such as medical expenses and doctors bills incurred to cure himself from illness, or in maintaining himself while performing his duties, or of his home while away on his duties by engaging a domestic servant are not wholly or necessarily incurred in the performance of the duties and therefore not exempted.

(2) No tax is payable in respect of any sum deducted from the salary payable by or on behalf of the Crown to any individual, being a sum deducted in accordance with the condition of his service, for the purpose of securing to him a deferred annuity or making provision

for his wife or children, *provided that the sum so deducted shall not exceed one-sixth of the salary* ✓

*Rent-free premises* Rent-free premises granted to an employee are made perquisites and to form an addition to the remuneration of the employee. In all cases where rent-free premises form part of the perquisites of an employee the maximum cash value taken for the purpose of assessment is 10 per cent of the employee's salary, whether quarters are furnished or not ✓

*Receipts from Provident Funds or from any other Fund or from Employer* : Income accruing from any provident or other fund other than (i) a recognized provident fund (ii) approved superannuation fund and (iii) funds under the Provident Funds Act, 1925, is liable to tax. In such cases all amounts arising from unrecognised provident funds to the employee, not being made up of his own contributions or the interest thereon, are brought to tax ✓

Similarly, lump sum payments received from an employer, direct as remuneration for past services and any other payments received from the employer, not being as compensation for loss of employment, are taxable

The Provident Funds Act, 1925, applies to (1) Government Provident Funds, (ii) Railway Provident Funds, (iii) to any provident funds established by any Local Authority notified in the local official Gazette and (iv) to provident funds for the benefit of the employees in any of the institutions as the Governor General in Council may notify. The interest derived by such provident funds on their investment is exempt from tax

*Ex-territoriality in respect of British subjects and Crown servants receiving salaries in Native States*  
All servants of Government including those whose services have been lent to a local authority established in exercise of the powers of the Crown Representative or the Central Government are liable to pay tax on

their salaries if they are employed in any part of India irrespective of nationality. No income-tax is, however, chargeable in respect of -

✓(a) the pay of officers whose services have been lent to and whose salaries are paid by, Indian States: *or*

(b) the portion of salaries of Government officers serving in Indian States, which is paid in the first instance by the Central Government or the Crown Representative but is subsequently recovered from the State concerned: *or*

(c) leave allowances for leave earned during the period of service in an Indian State;

*unless* such 'salaries' are liable by virtue of other provisions of the Act, *e. g.* (i) on a receipt basis under section 4 (1) (a) : (ii) by being brought into or received in British India under section 4 (1) (b) (iii) by a person resident; or (iii) owing to the recipient being ordinarily resident the income is to be included in his total income subject to the exemption of Rs. 4,500 allowed by the third proviso to section 4 (1) and the further exemption under section 14 (2) (c). ∴

#### **Interest on securities.**

Under this head the tax shall be payable by an assessee in respect of the interest receivable by him on any security of the Central Government or of a Provincial Government, or on debentures or other securities for money issued by or on behalf of a local authority of a company.

#### **Exemptions:**

(1) No income-tax is payable in respect of any sum deducted from such interest by way of commission by a banker realizing such interest on behalf of the assessee or in respect of any interest payable on money borrowed for the purpose of investment in the securities by the assessee except interest chargeable under the Act which is payable without British India not being interest on a loan issued for public subscription

before the 1st day of April, 1938, unless in respect of interest which is so chargeable tax has been paid or deducted under section 18, or unless there is a person in British India who may be appointed an agent under section 43 in respect of such interest. Thus, if money is borrowed from a foreign business of a British Indian resident, interest being made payable to such foreign business, the tax in respect of the interest paid by the borrower can be recovered from the lender as being part of the lender's foreign income. But if the borrowing should be made from one who is a non-resident, as for instance, from a resident of a Native State and the interest is also payable in the Native State such interest no doubt is deemed to accrue to the foreigner in British India and is taxable by reason of section 42 (1). But the interest deduction by the borrower can be claimed only if there is a person appointed as an agent in British India of such foreigner, from whom the tax can be recovered or the borrower himself pays the tax on behalf of the lender by deducting tax at the source. Exception is allowed in this respect if the loan is raised from foreign parts before the first of April 1938 and the loan is one issued to the public.

(2) No income-tax is payable on the interest receivable on any security of the Central Government issued or declared to be income-tax free. The 5 per cent. Loan 1945-55 of the Central Government is the only current security which has been issued free of income-tax and the only security therefore to which this provision applies.

(3) The income-tax payable on the interest receivable on any security of a Provincial Government issued income-tax free is payable by Provincial Government.

### **Property**

Under the head 'income from property' tax is payable in respect of the *bona fide* annual value of pro-

✓  
property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, *other than* such portions of such property as he may occupy for the purposes of any business, profession or vocation carried on by him, the profits of which are assessable to tax, *subject to the following allowances*, namely:

(i) where the property is in the occupation of the owner, or where it is let to a tenant and the owner has undertaken to bear the cost of repairs, a sum equal to one-sixth of such value, ✓

(ii) where the property is in the occupation of a tenant who has undertaken to bear the cost of repairs, the difference between such value and the rent paid by the tenant up to but not exceeding one-sixth of such value;

(iii) the amount of any annual premium paid to incur the property against risk of damage or destruction;

(iv) where the property is subject to a mortgage or other capital charge, the amount of any interest on such mortgage or charge, where the property is subject to an annual charge not being a capital charge, the amount of such charge, where the property is subject to a ground rent, the amount of such ground rent; and, where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital. *No allowance* is, however, due in respect of any interest or annual charge chargeable under the Act which is payable without British India (not being interest on a loan issued for public subscription before the first day of April 1938) unless in respect of such interest or charge tax has been paid or from which tax has been deducted under section 18 or in respect of which there is an agent under section 43,

(v) any sums paid on account of land-revenue in respect of the property,

(vi) in respect of collection charges, a sum not exceeding the prescribed maximum, viz. 6% of the annual value;

(vii) in respect of vacancies, that part of the annual value, which is proportional to the period during which the property is wholly unoccupied, or, where the property is let out in parts, that portion of the annual value, appropriate to any vacant part, which is proportional to the period during which such part is wholly unoccupied. In cases of vacancy the collection charges would be proportionately reduced.

*Unrealised rents* are excluded from the computation of the total income, where it is proved (1) that the tenancy is *bona fide*, (2) that the defaulting tenant has vacated or steps have been taken to compel him to vacate the property, (3) that the defaulting tenant is not in occupation of any other property of the assessee, (4) that the assessee has taken all reasonable steps to institute legal proceedings for the recovery of the unpaid rent, or satisfies the Income-tax Officer that legal proceedings would be useless and (5) that the annual value of the property to which the unpaid rent relates has been included in the assessed income of the year during which that rent was due and income-tax has been duly paid on such assessed income.

*Annual value* The *bona fide* annual value of a building is the full annual rent at which the building could be let from year to year if the owner bears all owner's burdens including municipal rates or taxes chargeable on the owner and if the tenant bears all tenant's burdens including municipal rates and taxes chargeable on the tenant. It differs from the actual annual rent payable on a long term lease or the actual rent payable on a yearly lease under a privileged rental or with tenant's liability to pay owner's rates or taxes.

It is to be noted that no deductions from the *bona fide* annual value are permissible on account of

any municipal or local rates or taxes in respect of property. Where, however, under the tenancy agreement the owner pays the occupier's share, of municipal tax, then the amount included in the rent on account of such tax is deductible from the gross rental for the purpose of arriving at the *bona fide* annual value. On the other hand if there is a stipulation that the tenant will, in addition to the regular rent payable to the owner, pay to the municipality the owner's share of tax, such tax must be deemed to be a part of the rental value and must be *added* to the rent to arrive at the *bona fide* annual value.

*Where the property is in the occupation of the owner* for the purposes of his own residence, 'annual value' shall for income-tax purposes, be deemed not to exceed 10 per cent of the total income of the owner.

*Property owned by two or more persons* : Where property is owned by two or more persons and their respective shares are definite and ascertainable, such persons shall not in respect of such property be assessed as an association of persons, but the share of each such person in the income from the property as computed in the manner explained above is to be included in his total income.

### **Business.**

An assessee shall also pay tax under the head 'Profits and gains of business, profession or vocation' in respect of the profit of gains of any business, profession or vocation carried on by him.

*Deductions* Such profits and gains shall be computed after making the following allowances, namely :—

(i) any rent paid for the premises in which such business, profession or vocation is carried on, provided that when any substantial part of the premises is used as a dwelling-house by the assessee, the allo-

wance under this clause shall be such sum as the Income-tax Officer may determine having regard to the proportional annual value of the part so used ,

(ii) in respect of repairs, where the assessee is the tenant only of the premises, and has undertaken to bear the cost of such repairs, the amount paid on account thereof, provided that, if any substantial part of the premises is used by the assessee as a dwelling-house, a proportional part only of such amount shall be allowed ,

(iii) in respect of capital borrowed for the purposes of the business, profession or vocation, the amount of the interest paid No allowance is, however, permissible for any interest chargeable under this Act which is payable without British India (not being interest on a loan issued for public subscription before the 1st day of April, 1938) unless in respect of such interest tax has been paid or tax has been deducted from it under section 18 or in respect of which there is an agent under section 43.

No allowance can be made for interest on share capital of companies, but a company is entitled to an allowance of the interest paid on its debentures subject to above;

(iv) in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, used for the purposes of the business, profession or vocation, the amount of any premium paid ;

(v) in respect of current repairs to such buildings, machinery, plant, or furniture, the amount paid on account thereof ,

(vi) in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent, where the assets are ships other than ships ordinarily plying on inland waters, to such percentage on the original cost thereof to the assessee as may in any case or class of cases be



prescribed and in any other case, to such percentage on the written down value thereof as may in any case or class of cases be prescribed; and where the buildings have been newly erected, or the machinery or plant being new has been installed, after the 31st day of March 1945, a further sum (which shall however not be deductible in determining the written down value for the purposes of this clause) in respect of the year of erection or installation equivalent,—

(a) in the case of buildings the erection of which is begun and completed between the 1st day of April 1946 and the 31st day of March 1948 (both dates inclusive), to fifteen per cent of the cost thereof to the assessee;

(b) in the case of other buildings, to 10 per cent of the cost thereof to the assessee;

(c) in the case of machinery or plant, to twenty per cent. of the cost to the assessee

*Provided that—*

(a) the prescribed particulars have been duly furnished;

(b) where full effect cannot be given to any such allowance in any year not being a year which ended prior to the 1st day of April 1939, owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, then subject to the provisions of clause (a) of the proviso to sub-section (2) of section 24, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or if there is no such allowance for that year, be deemed to be the allowance for that year, and so on for succeeding years; and

(c) the aggregate of all such allowances made under this Act or by Act repealed hereby, or under the Indian Income-tax 1886 shall, in no case,

exceed the original cost to the assessee of the buildings, machinery, plant, or furniture as the case may be

(vii) in respect of any such building, machinery or plant which has been sold or discarded or demolished or destroyed, the amount by which the written down value thereof exceeds the amount for which the building, machinery or plant, as the case may be, is actually sold or its scrap value.

Provided that such amount is actually written off in the books of the assessee

Provided further that where the amount for which any such building, machinery or plant is sold exceeds the written down value, so much of the excess as does not exceed the difference between the original cost and the written down value shall be deemed to be profits of the previous year in which the sale took place:

Provided further that where any insurance, salvage or compensation moneys are received in respect of any such building, machinery or plant which has been discarded or demolished or destroyed, and the amount of such money does not exceed the written value, the amount allowable under this clause shall be the amount, if any, by which the difference between the written down value and the scrap value exceeds the amount of such moneys

Provided further that where any insurance, salvage or compensation moneys are received in respect of any such building, machinery or plant as aforesaid, and the amount of such moneys exceeds difference between the written down value and the scrap value no amount shall be allowable under this clause and so much of the excess as does not exceed the difference between the original cost and the written down value less the scrap value shall be profits of the previous year in which such moneys were received

Provided further that for the purposes of this clause, the original cost of a building, the written down

value of which is determined in accordance with the first proviso to sub-section (5). shall be deemed to be the written down value so determined as at the date its being brought into use for the purposes of the business, profession or vocation:

(viii) in respect of animals which have been used for the purposes of the business, profession or vocation otherwise than as stock in trade and have died or become permanently useless for such purposes, the difference between the original cost to the assessee, the amount, if any, realised in respect of the carcases or animals,

(ix) any sums paid on account of land-revenue, local rates or municipal taxes in respect of such part of the premises as is used for the purposes of the business, profession or vocation:

(x) any sum paid to an employee as bonus or commission for services rendered, where sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission:

Provided that the amount of the bonus or commission is of a reasonable amount with reference to—

(a) the pay of the employee and the conditions of his service:

(b) the profits of the business, profession or vocation for the year in question: and

(c) the general practice in similar business professions or vocations:

(xi) when the assessee's accounts in respect of any part of his business, profession or vocation are not kept on the cash basis, such sum, in respect of bad and doubtful debts, due to the assessee in respect of that part of his business, profession or vocation, and in the case of an assessee carrying on a banking or money-lending business, such sum in respect of loans made in the ordinary course of such business as the Income-tax Officer may estimate to be irrecoverable but not exceeding the amount actually written off as irrecoverable in the books of assessee:

Provided that if the amount ultimately recovered on any such debt or loan is greater than the difference between the whole debt or loan and the amount so allowed, the excess shall be deemed to be a profit of the year in which it is recovered, and if less, the deficiency shall be deemed to be a business expense of that year,

(xii) any expenditure (not being in the nature of capital expenditure) laid out or expended on scientific research related to the business,

(xiii) any sum paid to a scientific research related to the class of business carried on, and any sum paid to a university, college or other institution to be used for such scientific research

Provided that such association, university, college or institution is for the time being approved for the purposes of this clause by the prescribed authority,

(xiv) in respect of any expenditure of a capital nature on scientific research related to the business, an allowance for each of the five consecutive previous years beginning with the year in which the expenditure was incurred, or where the expenditure was incurred prior to the commencement of the business, for each of the five consecutive previous years beginning with the year in which the business was commenced, equal to one-fifth of such expenditure

Provided that no allowance shall be made for any expenditure incurred more than three years before the commencement of the business

Provided further that—

(a) where an asset representing scientific research expenditure of a capital nature ceases to be used for scientific research related to such business—

(i) no allowance shall be made in respect of any previous year after the previous year in which the cessation takes place, and

(ii) if the aggregate of the amounts allowed under this clause added to the value of the asset

immediately before the cessation is less than the said expenditure, there shall also be allowed in respect of the previous year in which the cessation takes place an additional deduction equal to the difference;

(b) where such asset is sold without having been used for other purposes, the sale proceeds shall be taken to be the value of the asset immediately before the cessation, and if an additional allowance or a greater additional allowance would have been made in respect of the previous year in which the cessation occurred on the basis of that value, an amount equal to the additional allowance which would have been made or, as the case may be, to the difference between the additional allowance which would have been made and the additional allowance which was made for that year shall be made in respect of the previous year in which the sale occurs;

(c) where the proceeds of the sale plus the total amount of the allowances made under this clause exceed the amount of the expenditure, the excess or the amount of the allowances so made, whichever is the less, shall be treated as a receipt of the business accruing at the time of the sale;

(d) where a deduction is allowed for any previous year under this clause in respect of expenditure represented wholly or partly by any asset, no deduction shall be allowed under clause (vi) or clause (vii) for the same previous year in respect of that asset;

(e) where an asset is used in the business to be used for scientific research related to that business and a claim for an allowance under clause (vi) or clause (vii) is made in respect of that asset, the actual cost to the assessee of the asset shall be treated as reduced by the amount of any deductions allowed under this clause,

(f) clause (b) of the proviso to clause (vi) shall apply in relation to deductions allowable under this

clause as it applies in relation to deductions allowable in respect of depreciation ,

(g) if any question arises under clause (xii), clause (xiii) or this clause as to whether, and if so to what extent, any activity constitutes or constituted or was being used for, scientific research, the Central Board of Revenue shall refer the question to the prescribed authority, whose decision shall be final ,

*Explanation:—*In clause (xii), clause (xiii) and this clause (1) "scientific research" means any activities in the fields of natural or applied science for the extension of knowledge ,

(ii) references to expenditure incurred or scientific research do not include any expenditure incurred in the acquisition of rights in, or arising out of, scientific research, but, save as aforesaid, include all expenditure incurred for the prosecution of, or the provision of facilities for the prosecution of, scientific research ,

(iii) references to scientific research to a business or class of business include —

(a) any scientific research which may lead to or facilitate an extension of that business or, as the case may be, all businesses of that class

(b) any scientific research of a medical nature which has a special relation to the welfare of workers employed in that business or, as the case may be business of that class ,

(xv) any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation,

(3) where any building, machinery, plant or furniture in respect of which any allowance is due under clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (2) is not wholly used for the purposes

of the business, profession or vocation, the allowance shall be restricted to the fair proportional part of the amount which would be allowable if such building, machinery, plant or furniture was wholly so used.

(4) Nothing in clause (ix) or clause (xii) of sub-section (2) shall be deemed to authorise the allowance of any sum paid on account of any cess, rate or tax levied on the profits or gains of any business, profession or vocation or assessed at a proportion of or otherwise on the basis of any such profits or gains and nothing in clause (xii) of sub-section (2) shall be deemed to authorise-

(a) any allowance in respect of a payment which is chargeable under the head 'salaries' if it is payable without British India and tax has not been paid there on nor deducted therefrom under section 18; or

(b) any allowance in respect of any payment by way of interest, salary, commission or remuneration made by a firm to any partner of the firm; or

(c) any allowance in respect of a payment to a provident or other fund established for the benefit of employees unless the employer has made effective arrangements to secure that tax shall be deducted at source from any payments made from the fund which are taxable under the head 'Salaries'.

(5) In sub-section (2), 'paid' means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under this section; 'plant' includes vehicles, books, scientific apparatus and surgical equipment purchased for the purposes of the business, profession or vocation; and 'written down value' means-

(a) in the case of assets acquired in the previous year, the actual cost to the assessee;

(b) in the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this Act, or

any Act repealed thereby, or under executive orders issued when the Indian Income-tax Act, 1886, was in force

Provided that in the case of a building previously the property of the assessee and brought into use for the purposes of business, profession or vocation after the 28th day of February 1946, 'written down value' means the actual cost to the assessee reduced by an amount equal to the depreciation calculated at the rate in force on that date that would have been allowable had the building been used for the aforesaid purposes since the date of its acquisition by the assessee and had the provisions of this Act relating to the allowance for depreciation been in force on and from the date of acquisition

Provided further that where the provisions of the proviso to sub-section (2) of section 29 are applicable, the actual cost to the assessee referred to in clauses (a) and (b) shall be the actual cost to the person succeeded in the business, profession or vocation

(6) A trade, professional or similar association performing specific services for its members for remuneration definitely related to those services shall be deemed for the purpose of this section to carry on business in respect of those services, and the profits and gains therefrom shall be liable to tax accordingly

(7) Notwithstanding anything to the contrary contained in sections 8, 9, 10, 12 or 18, the profits and gains of any business of insurance and the tax payable thereon shall be computed in accordance with the rules contained in the Schedule to this Act.

### **Other sources.**

Under the head 'Income from other sources' an assessee shall pay tax in respect of income, profits and gains of every kind which may be included in his total income (if not included under any of the preceding heads) Such income, profits and gains shall be



computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains *provided* that no allowance shall be made on account of—

- (a) any personal expenses of the assessee, or
- (b) any interest chargeable under the Act which is payable without British India, not being interest on a loan issued for public subscription before the 1st day of April, 1938, or not being interest on which tax has been paid or from which tax has been deducted under section 18, or
- (c) any payment which is chargeable under the head "Salaries", if it is payable without British India and tax has not been paid thereon nor deducted therefrom under section 18

Where an assessee lets on hire machinery, plant or furniture belonging to him, he shall be entitled to allowances in accordance with the provisions of (iv), (v), (vi) and (vii) of sub-section (1) of section 10 of the Act (See under the head "business").

Where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture he shall be entitled to allowances in accordance with the provisions of clauses (iv), (v), (vi) and (vii) of sub-section (2) of section 10 of the Act in respect of such buildings.

**Capital Gains.** Under the "capital gains" an assessee is to pay tax in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after the 31st of March 1946; and such profits and gains shall be deemed to be income of the previous year in which the sale, exchange or transfer took place.

*Exemptions* (1) where the amount of capital

gains in the previous year does not exceed fifteen thousand rupees, the tax shall not be payable by the assessee and such amount shall not be included in his total income.

(2) The tax shall not be payable by an assessee in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset, being property the income of which is chargeable under section 9 (see under the head "property") and which has been possessed by the assessee or a parent of his for not less than seven years before the date on which the sale, exchange or transfer took place, and the amount of such profits or gains shall not be included in his total income

(3) Any transfer of capital assets by reason of the compulsory acquisition thereof under any law for the time being in force relating to the compulsory acquisition of property for public purposes or any distribution of capital assets on the total or partial partition of a Hindu undivided family, or on the dissolution of a firm or other association of persons, or on the liquidation of a company, or under a deed of gift, bequest, will or transfer on irrevocable trust shall not, for the above purpose, be treated as sale, exchange or transfer of the capital assets

(4) The transfer of a capital asset by a company to a subsidiary company, the whole of the share capital of which is held by the parent company or by the nominees thereof, shall not be treated as a sale, exchange or transfer for the above purposes where the subsidiary company is resident in British India and is registered under the Indian Companies Act, 1913, so howthat for the purposes of clause (vi) or clause (vii) of sub-section (2) of section 10, the cost or the written down value, as the case may be, of the transferred capital asset shall be taken to be the same as it would have been if the parent company had continued to hold the capital as set for the purposes of its business

"*Capital asset*" means property of any kind (other than agricultural land) held by an assessee, whether or not connected with his business, profession or vocation, but does include— (1) any 'stock-in-trade' consumable stores or raw materials held for the purposes of his business, profession or vocation; (ii) personal effects, that is to say, movable property (including wearing apparel, jewellery and furniture) held for personal use by the assessee or any member of his family dependent on him.

*Method of computation* (A) The amount of a capital gain shall be computed after making the following *deductions* from the full value of the consideration for which the sale, exchange or transfer of the capital asset is made, namely:-

(i) expenditure incurred solely in connection with such sale, exchange or transfer,

(ii) the actual cost to the assessee of the capital asset, including any expenditure of a capital nature incurred and borne by him in making any additions or alterations thereto, but excluding any expenditure in respect of which any allowance is admissible under any provision of sections 8,9,10 and 12.

*Provided* that where a person who acquires a capital asset from the assessee, whether by sale, exchange or transfer, is a person with whom the assessee is directly or indirectly connected, and the Income-tax Officer has reason to believe that the sale, exchange or transfer was effected with the object of avoidance or reduction of the liability of the assessee under the above provisions, the full value of the consideration for which the sale, exchange or transfer is made shall, with the prior approval of the Inspecting Assistant Commissioner of Income-tax, be taken to be the fair market value of the capital asset on the date on which the sale, exchange or transfer took place

*Provided further* that where the capital asset is an asset in respect of which the assessee has obtained

*depreciation allowance* in any year, the actual cost of the asset to the assessee shall be its written down value, as defined in section 10, increased or diminished, as the case may be, by any adjustment made under clause (vii) of sub-section (2) of that section.

*provided further* that where the capital asset became the property of the assessee before the 1st day of January, 1939, he may, on proof of the fair market value thereof on the said date to the satisfaction of the Income-tax Officer, substitute for the actual cost such fair market value which shall be deemed to be the actual cost to him of the asset, and which shall be reduced by the amount of depreciation, if any, allowed to the assessee after the said date and increased or diminished as the case may be, by any adjustment made under clause (vii) of sub-section (2) of section 10.

*Provided further* that where the capital asset was on any previous occasion the subject of negotiations for its sale, exchange or transfer, any option or other money received and retained by the assessee in respect of such negotiations shall be deducted in computing the actual cost to him of such asset.

(B) Where any capital asset became the property of the assessee under any of the circumstances referred to in *exemption* under head (3) above, its actual cost allowable to him for the purposes of this section shall be its actual cost to the previous owner thereof, and the above provisions regarding method of computation shall apply accordingly, and where the actual cost to the previous owner cannot be ascertained, the fair market value at the date on which the capital asset became the property of the previous owner shall be deemed to be the actual cost thereof.

*Exceptional cases* Where a capital gain arises from the sale, exchange or transfer of a capital asset which immediately before the date on which the sale, exchange or transfer took place was being used by the assessee

for the purposes of his business, profession or vocation or which in the two years immediately preceding that date was being used by him or a parent of his mainly for the purposes of his own or the parent's own residence, and the assessee has within a period of one year before or after that date purchased a new capital asset for the same purposes of his business, profession or vocation or, as the case may be, for the purposes of his own residence, then instead of the capital gain being charged to tax as income of the previous year in which the sale, exchange or transfer took place, it shall, if the assessee so elects in writing before the assessment is made be dealt with in accordance with the following provisions

*(a) if the amount of the capital gain is greater than the cost of the new asset,-* (i) the difference between the amount of the capital gain and the cost of the new asset shall be charged under the above provisions as income of the previous year, and (ii) for the purposes of computing in respect of the new asset any allowance under clause (vi) or clause (vii) of sub-section (2) of section 10 or the amount of any capital gain arising from its sale, exchange or transfer, the cost or the written down value, as the case may be, shall be nil, or

*(b) if the amount of the capital gain is equal to or less than the cost of the new asset,-* (i) the capital gain shall not be charged under the above provisions, and (ii) for the purposes of computing in respect of the new asset any allowance under the said clause (vi) or any allowance or adjustment under the said clause (vii) or the amount of any capital gain arising from its sale, exchange or transfer, the cost or the written down value, as the case may be, shall be reduced by the amount of the capital gain.

*provided that* where in respect of the purchase of a new capital asset consisting of plant or machinery the assessee satisfies the Income-tax Officer that des-

pite exercise of due diligence it has not been possible to make the purchase within the period specified under these provisions, the Income-tax Officer may, with the prior approval of the Inspecting Assistant Commissioner of Income-tax, extend the said period to such date as he considers reasonable

### **Income not to be taxed**

(a) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application, thereto

(b) Any income derived from business carried on on behalf of a religious or charitable institution when the income is applied solely to the purposes of the institution and— (i) the business is carried on in the course of the carrying out of a primary purpose of the institution, or (ii) the work in connection with the business is mainly carried on by beneficiaries of the institution

(c) Any income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes

(d) The income of local authorities except income from a trade or business carried on by the authority so far as that income is not income arising from the supply of a commodity or service within its own jurisdictional area

(e) Interest on securities which are held by, or are the property of any Provident Fund to which the Provident Funds Act, 1925, applies

(f) Any special allowance, benefit or perquisite specifically granted to meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit

(g) Any receipts not being receipts arising from business or the exercise of a profession, vocation or

occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of the employee.

(h) Agricultural income.

(i) Any income received by trustees on behalf of a recognised provident fund.

(j) Any income received—

(i) by a person accredited as representative in British India for political purposes of an Indian State or the Ruler thereof, as his remuneration from the State or Ruler for service in such capacity,

(ii) by a Consul General, Consul, Vice-Consul or Consular Agent of a foreign State, as remuneration from such State for service in such capacity;

(iii) by a person employed by the Consulate of a foreign State, not being a British subject or the subject of an Indian State, as remuneration from such foreign State for service in such capacity;

(iv) by a Trade Commissioner or other official representative in British India of the Government of any other part of the British Empire or of a foreign Government, as his official salary, if the official salary of the corresponding officials, if any, of the Central Government resident for similar purposes in the country concerned enjoy a similar exemption in that country;

(v) by a member of the staff of Trade Commissioner or official representative referred to in sub-clause (iv) above, as his official salary; when such member is a subject of the country represented, and the country represented has made corresponding provisions for similar exemptions in the case of members of the staff of the corresponding officials of the Central Government.

(k) The income chargeable under the head "Salaries" of a Nepalese member of the Nepalese Military

Force serving with His Majesty's Forces, or any member of an Indian State Force so serving, and any other income accruing or arising without British India by any such member while the Force to which he belongs is serving with His Majesty's Forces

"*Charitable purpose*" includes relief of the poor, education, medical relief, and the advancement of any other object of general public utilities, but not that part of the income of a private religious trust which does not enure for the benefit of the public

"*Agricultural income*" means—

(a) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land-revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such,

(b) any income derived from such land by— (i) agriculture, or (ii) the performance by a cultivator or receiver of rent in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or (iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-clause (ii),

(c) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land, or occupied by the cultivator or the receiver of rent-in-kind, of any land with respect to which, or the produce of which, any operation mentioned in sub-clauses (ii) and (iii) of clause (b) is carried on,

*Provided that* the building is on or in the immediate vicinity of the land, and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent-in-kind by reason of his



connection with that land. requires as a dwelling-house, or as a store-house or other out-building.

In the case of income which is partially agricultural income and partially income chargeable to income-tax under the head "Business". in determining that part which is chargeable to income-tax the market-value of any agricultural produce which has been raised by the assessee or received by him as rent in kind and which has been utilised as raw material in such business or the sale receipts of which are included in the accounts of the business shall be deducted. and no further deduction shall be made in respect of any expenditure incurred by the assessee as a cultivator or receiver of rent in kind

For this purpose "market-value" shall be deemed to be— (a) where agricultural produce is originally sold in the market in its raw state. or after application to it of any process ordinarily employed by a cultivator or receiver of rent in kind to render it fit to be taken to market. the value calculated according to the average price at which it has been so sold during the year previous to that in which the assessment is made; (b) where agricultural produce is not ordinarily sold in the market in its raw state, the aggregate of— (1) the expenses of cultivation; (2) the land revenue or rent paid for the area in which it was grown: and (3) such amount as the Income-tax Officer finds, having regard to all the circumstances in each case. to represent a reasonable rate of profit on the sale of the produce in question as agricultural produce

#### **Exemptions of a general nature.**

(1) The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family where such sum has been paid out of the income of the family.

(2) The tax shall not be payable by an assessee—

(a) if a partner of an unregistered firm, in respect of any portion of his share in the profits and gains of the firm computed in the manner laid down in clause (b) of sub-section (1) of section 16 on which the tax has already been paid by the firm, or

(b) if a member of an association of persons other than a Hindu undivided family, a company or a firm, in respect of any portion of the amount which he is entitled to receive from the association on which the tax has already been paid by the association, or

(c) in respect of any income, profits, or gains, accruing or arising to him within an Indian State, unless such income, profits or gains are received or deemed to be received in or are brought into British India in the previous year by or on behalf of the assessee, or are assessable under section 42

#### **Exemption in the case of life insurance.**

No tax shall be payable in respect of any sum paid by an assessee to effect an insurance on the life of the assessee or on the life of a wife or husband of the assessee or in respect of a contract for a deferred annuity on the life of the assessee or on the life of a wife or husband of the assessee, or as a contribution to any Provident Fund to which the Provident Funds Act, 1925, applies.

Where the assessee is a Hindu undivided family, there shall be exempted any sum paid to effect an insurance on the life of any male member of the family or of the wife of any such member.

The above *shall not apply* to so much of any premium or other payment made on a policy other than a contract for a deferred annuity as is in excess of ten per cent of the actual capital sum assured, and in calculating any such capital sum no account shall be taken of the value of any premiums agreed to be returned or of any benefit by way of bonus or otherwise which is to be or may be received either before

or after death either by the person paying the premium or by any other person and which is not the sum actually assured.

*Maximum exemption under this head:* The aggregate of any sums exempted under the above provisions under the head "life insurance" shall not, together with any sums exempted under the second proviso to sub-section (1) of section 7 (under the head "salary" deducted for securing to the assessee a deferred annuity or making provision for his wife and children and any sums exempted under sub-section (1) of section 58 F (contributions to a recognised provident fund and interest credited on the accumulated balance of any employee in a recognised provident fund). exceed in the case of an individual, one-sixth of the total income of the assessee, or six thousand rupees, whichever is less, and in the case of a Hindu undivided family, one-sixth of the total income of the assessee, or twelve thousand rupees, whichever is less.

### **Super-tax.**

In addition to the income-tax charged for any year, there is charged, levied and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, local authority, unregistered firm or other association of persons, not being a registered firm, or the partners of the firm or members of the association individually, an additional duty of income-tax called "super-tax" at the rate or rates laid down for that year by the annual Finance Act of the Central Legislature

### **Procedure for assessment of income-tax.**

*Return of income:* On or before the 1st day of May in each year, the Income-tax Officer is to give notice, by publication in the press and by publication in the prescribed manner, requiring every person whose total income during the previous year exceeded the maximum amount which is not chargeable to in-

come-tax to furnish, within such period not being less than sixty days as may be prescribed in the notice, a return, in the prescribed form and verified in the prescribed manner, setting forth (along with such other particulars as may be required by the notice) his total income and *total world income* during that year. The Income-tax Officer may in his discretion extend the date for the delivery of the return in the case of any person or class of persons.

In the case of any person whose total income is, in the Income-tax Officer's opinion, of such an amount as to render such person liable to income-tax the Income-tax Officer may serve a notice upon him requiring him to furnish, within such period, not being less than thirty days, as may be specified in the notice a return in the same manner as prescribed above. In this case also the date for the delivery of the return may be extended by Income-tax Officer in his discretion.

If any person has not furnished a return within the time allowed in the manner explained above, or having furnished a return discovers any omission or misstatement therein, he may furnish a return or *revised return*, as the case may be, at any time before the assessment is made.

The Income-tax Officer may serve on any person who has made a return or has been called upon to make return, a notice requiring him on a date to be therein specified, to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require. The Income-tax Officer cannot, however, require the production of any accounts relating to a period more than three years prior to the previous year.

The prescribed form of the returns referred to above shall, in the case of assessee engaged in any business, profession or vocation, require him to furnish particulars of the location and style of the principal

place wherein he carries on the business, profession or vocation and of any branches thereof, the names and addresses of his partners, if any, in such business, profession or vocation and the extent of the share of the assessee and the shares of all such partners in the profits of the business, profession or vocation and any branches thereof.

*Assessment* · If the Income-tax-Officer is satisfied without requiring the presence of the assessee or the production by him of any evidence that a return as made above is correct and complete, he shall assess the total income of the assessee, and shall determine the sum payable by him on the basis of such return. If he is not thus satisfied, he shall serve on such person a notice requiring him, on a date to be therein specified, either to attend at the Income-tax Officer's office or to produce, or to cause to be there produced, any evidence on which such person may rely in support of the return, and then after hearing such evidence, assess the total income accordingly.

On failure of a person to make a return as required above, the Income-tax Officer shall make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment and, in the case of a firm, may refuse to register it or may cancel its registration if it is already registered after due notice,

*Penalty for concealment of income or improper distribution of profits* : Penalty for not filing a return within the time allowed is, in addition to the amount of the income-tax and super-tax, if, any, payable by him, a sum not exceeding one and a half times that amount.

Penalty for not producing accounts or documents or evidence as required by the Income-tax Officer, or for concealing particulars of the income or deliberately furnishing inaccurate particulars of such income is, in addition to any tax payable by him, a sum not

exceeding one and a half times the amount of the income-tax and super-tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income

*No penalty* is liable on an assessee whose total income is less than three thousand five hundred rupees unless he was served with *special* notice under section 22 (2) by the Income-tax Officer to file a return

Similarly, where a person has failed to comply with a notice under section 22 (2) and proves that he has no income liable to tax, the penalty imposable shall not exceed twenty-five rupees,

*Notice of demand* When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of the Act, the Income-tax Officer shall serve upon the assessee or order person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable. The amount must be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so specified in the notice or order, or if a time is not so mentioned, then on or before the first day of the second month following the day of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, *provided that*, when an assessee has presented an appeal, the Income-tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of

When an assessee is in default in making a payment of income-tax, the Income-tax Officer may in his discretion direct that, in addition to the amount of the arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty. The amount of the income-tax as well as of penalty, if any, may be recovered as an arrear of land-revenue

*Cancellation of assessment when cause is*

## INCOME-TAX

*/shown*: Where an assessee within one month from the service of a notice of demand, satisfies the Income-tax Officer that he was prevented by sufficient cause from making the return within the time allowed or that he did not receive any notice or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying with the terms of a notice, the Income-tax Officer must cancel the assessment and proceed to make a fresh assessment

*Appeal*. An appeal lies to the Appellate Assistant Commissioner in the prescribed form and duly verified within thirty days of the notice of demand.

## THE INDIAN FINANCE ACT, 1947

6. (1) Subject to the provisions of sub-sections (3), (4), (5) and (6), for the year beginning on the 1st day of April 1947—

(a) income-tax shall be charged at the rates specified in Part I of the Schedule, and

(b) rates of super-tax shall, for the purpose of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Schedule

(2) In making any assessment for the year ending on the 31st day of March 1948, there shall be deducted from the total income of an assessee, in accordance with the provisions of section 15A of the Indian Income-tax Act, 1922, an amount equal to one-fifth of the earned income, if any, included in his total income, but not exceeding in any case four thousand rupees

(3) In making any assessment for the year ending on the 31st day of March, 1948,—

(a) where the total income of an assessee, not being a company includes any income chargeable under the head "Salaries" as reduced by the deduction for earned income appropriate thereto, or any income chargeable under the head "Interest on securities", or any income from dividends in respect of which he is deemed under section 49B of the Indian Income-tax Act, 1922, to have paid income-tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation

of the Indian Finance Act, 1946, on his total income the same proportion as the amount of such inclusions bears to his total income,

(b) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" on which super-tax has been or might have been deducted under the provisions of sub-section (2) of section 18 of the Indian Income-tax Act, 1922, the super-tax payable by the assessee on that portion of his total income which consists of such inclusion shall be an amount bearing to the total amount of super-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1946, on his total income the same proportion as the amount of such inclusion bears to his total income

(4) In making any assessment for the year ending on the 31st day of March 1948, where the total income of an assessee consists partly of earned income and partly of unearned income, the super-tax payable by him shall be—

(1) on that part of the earned income chargeable under the head "Salaries" to which clause (b) of sub-section (3) applies, the amount of super-tax computed in accordance with the provisions of that sub-section, *plus*

(11) on the remainder of the earned income, the amount which bears to the total amount of super-tax which would have been payable on his total income had it consisted wholly of earned income the same proportion as such remainder bears to his total income, *plus*

(111) on the unearned income, the amount which bears to the total amount of super-tax which would have been payable on his total income had it consisted wholly of unearned income the same proportion as the unearned income bears to his total income

(5) In making any assessment for the year ending on the 31st day of March 1948, —

(a) where the total income of a company includes any profits and gains from life insurance business, the super-tax payable by company shall be reduced by an amount computed at the rate of two annas in the rupee on that part of its total income which consists of such inclusion,

(b) where the total income of an assessee, not being a company, includes any profits and gains from life insurance business, the income-tax and super-tax payable by the asse-



see on that part of his total income which consists of such inclusion shall be an amount bearing to the total amount of such taxes payable according to the rates applicable under the operation of the Indian Finance Act, 1942, on his total income the same proportion as the amount of such inclusion bears to his total income, so however that the aggregate of the taxes so computed in respect of such inclusion shall not in any case exceed the amount of tax payable on such inclusion at the rate of five annas in the rupee

(6) In cases to which section 17 of the Indian Income-tax Act, 1922, applies the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (1), and in accordance, where applicable, with the provisions of sub-sections (3), (4) and (5) of this section

(7) For the purposes of making any deduction of income-tax in the year beginning on the 1st day of April 1947, under sub-section (2) or sub-section (2B) of section 18 of the Indian Income-tax Act, 1922, from any earned income chargeable under the head "Salaries", the estimated total income of the assessee under this head shall, in computing the income-tax to be deducted, be reduced by an amount equal to one-fifth of such earned income, but not exceeding in any case four thousand rupees

(8) For the purposes of this section and of the rates of tax imposed thereby, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922, and the expression "earned income" has the meaning assigned to it in clause (6 AA) of section 2 of that Act.

7. *Amendment of section 10, Act XII of 1942-* To sub-section (2) of section 10 of the Indian Finance Act, 1942, the following proviso shall be added, namely.—

"Provided that if it is subsequently found that the sum so repaid was excessive, the excess repayment shall be recoverable, and the provisions of law referred to in sub-section (4) of section 2 of the Excess Profits Tax Ordinance, 1943, shall apply to the payment and recovery of the amount of the excess repayment as if that amount were a deposit required to be made under that section, but notwithstanding the provisions of sub-section (7) of section 46 of the Indian Income-tax Act, 1922, as applied by the said sub-section (4), such recovery may be made at any time."

## THE SCHEDULE

(See Section 6)

## PART I

## Rates of Income-tax

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons not being a case to which paragraph B of this Part applies—

	Rate
1 On the first Rs 1,500 of total income	Nil
2 On the next Rs 3,500 of total income	One anna in the rupee
3 On the next Rs 5,000 of total income	Two annas in the rupee
4 On the next Rs 5,000 of total income	Three and a half annas in the rupee
5 On the balance of total income	Five annas in the rupee

Provided that—

(i) no income-tax shall be payable on a total income which before deduction of the allowance, if any, for earned income, does not exceed Rs 2,500

(ii) the income-tax payable shall in no case exceed half the amount by which the total income (before deduction of the said allowance, if any, for earned income) exceeds Rs 2,500,

(iii) the income-tax payable on the total income as reduced by the allowance for earned income shall not exceed either—

(a) a sum bearing to half the amount by which the total income (before deduction of the allowance for earned income exceeds Rs 2,500 the same proportion as such reduced total income bears to the unreduced total income, or

(b) the income-tax payable on the income so reduced at the rates herein specified,—  
whichever is less

B.—In the case of every company and local authority, and in every case in which under the provisions of the Indian Income-tax Act, 1922, income-tax is to be charged at the maximum rate—

On the whole of total income      Five annas in the rupee

## PART II

## Rates of Super-tax

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons, not being a case to which any other paragraph of this Part applies—

	Rate, if income wholly earned.	Rate, if income wholly unearned.
1. On the first Rs. 25,000 of total income	Nil	Nil. ...
2 On the next Rs. 5,000 of total income.	Two annas in the rupee.	Three annas in the rupee.
3. On the next Rs. 5,000 of total income	Two and a half annas in the rupee	Three and a half annas in the rupee.
4. On the next Rs. 10,000 of total income.	Three annas in the rupee.	Four annas in the rupee
5 On the next Rs. 10,000 of total income	Four annas in the rupee.	Five annas in the rupee
6. On the next Rs 10,000 of total income	Five annas in the rupee	Six annas in the rupee.
7 On the next Rs 10,000 of total income.	Six annas in the rupee	Seven annas in the rupee
8 On the next Rs 15,000 of total income	Seven annas in the rupee.	Eight annas in the rupee
9. On the next Rs. 15,000 of total income	Eight annas in the rupee.	Nine annas in the rupee.
10 On the next Rs 15,000 of total income.	Nine annas in the rupee	Ten annas in the rupee
11 On the next Rs. 30,000 of total income	Ten annas in the rupee	Ten and a half annas in the rupee
12 On the balance of total in- come	Ten and a half annas in the rupee	Ten and a half annas in the rupee.

B —In the case of every local authority—

On the whole of total income	Rate Two annas in the rupee
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C—In the case of an association of persons being a co-operative society, other than the Sanikatta Saltowners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of a Provincial Legislature governing the registration of co-operative societies—

- |  | Rate                   |
|--|------------------------|
| (1) On the first Rs 25,000 of total income | Nil                    |
| (2) On the balance of total income         | Two annas in the rupee |

D—In the case of every company—

	Rate
On the whole of total income	Two annas in the rupee.

and in addition, in respect of that part of the total income (as reduced by the amount of dividends payable at a fixed rate) which does not exceed the amount of dividends, not being dividends payable at a fixed rate, declared in British India in respect of the whole or part of the previous year for the assessment for the year ending on the 31st day of March 1948, on the amount by which such part—

- |   | Rate                      |
|---|---------------------------|
| (a) exceeds 30 per cent, but does not exceed 40 per cent, of the total income as so reduced | Three annas in the rupee  |
| (b) exceeds 40 per cent, but does not exceed 50 per cent, of the total income as so reduced | Five annas in the rupee   |
| (c) exceeds 50 per cent., of the total income as so reduced                                 | Seven annas in the rupee. |

Provided that—

(i) no additional super-tax shall be payable where such part is less than, or equal to, five per cent on the capital of the company ;

(ii) where such part is more than five per cent on the capital of the company, the additional super-tax payable shall be reduced by the amount of additional super-tax which would, but for the provisions of clause (i) of this proviso, have been payable had such part been equal to five per cent on the capital of the company,

(iii) the additional super-tax shall be payable only by a company in which the public are substantially interested within the meaning of the *Explanation* to sub-section (1) of section 23A of the Indian Income-tax Act, 1922, or a subsidiary company of such a company where the whole of the share capital of such sub-



which would have been payable on his total world income had it been his total income the same proportion as his total income bears to his total world income.

Where there is included in the total income of any assessee any income (including income from a share in an unregistered firm, if assessed as such) exempted from tax by or under the provisions of this Act, the income-tax excluding super-tax payable by the assessee shall be an amount bearing to the total amount of the income-tax excluding super-tax which would have been payable on the total income had no part of it been exempted the same proportion as the unexempted portion of the total income bears to the total income

(3) Where there is included in the total income of any assessee any income exempted from tax under clause (c) of sub-section (2) of section 14, the super-tax payable by the assessee shall be an amount bearing to the total amount of the super-tax which would have been payable on the total income had no part of it been so exempted the same proportion as the total income less the portion so exempted bears to the total income

(4) Where any income exempted from tax under clause (c) of sub-section (2) of section 14 which has been taken into account under sub-section (2) of sub-section (3) of this section as part of the total income of an assessee for the purpose of determining the income-tax or super-tax payable by him is in a subsequent year brought into or received in British India by the assessee and becomes chargeable with tax accordingly, the tax including super-tax payable by the assessee on his total income or that subsequent year shall be—

(a) the amount which bears to the total amount of the tax including super-tax which would have been payable on his total income as reduced by the amount of the income so brought into or received in British India had such reduced income been his

total income the same proportion as his total income bears to such reduced income, or

(b) the amount which bears to the total amount of the tax including super-tax which would have been payable on the amount of the income so brought into or received in British India had such income been his total income the same proportion as his total income so brought into or received in British India, whichever is the greater.

(5) Where the amount of the total income of any assessee is deemed to be the total income reduced under the provisions of section 15-A by an allowance for earned income, the expression "total income" in this section shall, for the purpose of determining the amount of income-tax (but not super-tax) payable by the assessee, be deemed to be his total income so reduced.

(6) Where the total income of an assessee, not being a company, includes any income chargeable under the head "capital gains" the tax, including super-tax, payable by him on his total income shall be—

(i) income-tax and super-tax payable on his total income as reduced by the amount of such inclusion, had such reduced income been his total income, *plus*

(ii) income-tax on the whole amount of such inclusion at the following rates, namely:—

where such amount—	Rate.
exceeds Rs 15,000 but does not exceed Rs. 50,000.....	One anna in the rupee,
exceeds Rs. 50,000 but does not exceed Rs 2,00,000.....	Two annas in the rupee,
exceeds Rs. 2,00,000 but does not exceed Rs 5,00,000.....	Three annas in the rupee,
exceeds Rs 5,00,000 but does not exceed Rs. 10,00,000.....	Four annas in the rupee
exceeds Rs. 10,00,000.....	Five annas in the rupee:

Provided that where owing to the fact that the amount of such inclusion has exceeded a certain limit, income-tax thereon is payable or is payable at a higher rate, the

amount of income-tax so payable shall be reduced so as not to exceed—

(a) the amount which would have been payable if the amount of such inclusion had not exceeded that limit, plus

(b) one-half of the amount by which the amount of such inclusion exceeds that limit

(7) Where the total income of a company includes any income chargeable under the head "capital gains", the super-tax payable by the company in any year shall be reduced by an amount computed on that part of its total income which consists of such inclusion at the rate of super-tax (excluding the rate of additional super-tax, if any) specified in the case of a company by the annual Act of the Central Legislature fixing the rate or rates of tax for that year

### Business Profits Tax

By the Business Profits Tax Act, 1947, another special tax on income arising from business has been imposed. For this purpose, "*business*" includes any trade, commerce or manufacture, or any adventure in the nature of trade, commerce or manufacture, or any profession or vocation the profits of which are chargeable according to the provisions of section 10 of the Indian Income-tax Act, 1922, *provided that* where the functions of a company or of a society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this definition to be a business carried on by such company or society, *provided further* that all businesses to which this Act applies carried on by the same person shall be treated as one business for this purpose.

### Charge of tax

It is provided that there shall, in respect of any business to which this Act applies, be charged, levied and paid on the amount of the *taxable profits* during any *chargeable accounting period*, a tax which shall be equal to sixteen and two-thirds percent of the taxable profits. The following are *totally exempt* from



this tax : (a) any profits which are, under the provisions of sub-section (3) of section 4 of the Indian Income-tax, 1922, exempt from income-tax; (b) all profits from any business of life insurance; and (c) any sum paid to a business by or through the Central Government by way of bonus or subsidy.

The Act *does not apply* to any business the whole of the profits of which accrue or arise without British India where such business is carried on by or on behalf of a person who is resident but not ordinarily resident in British India, unless the business is controlled in India. It does not apply also to any income, profits or gains of business accruing or arising within an Indian State unless such income, profits or gains are received or deemed under the provisions of the Indian Income-tax Act, 1922, to be received in or are brought into British India in any chargeable accounting period, or are assessable under section 42 of that Act.

"*Chargeable accounting period*" means- (a) any accounting period falling wholly within the term beginning the first day of April, 1946, and ending on the thirty-first day of March, 1947; (b) where any accounting period falls partly within and partly without the said term, such part of that accounting period as falls within the said term

"*Accounting period*" in relation to any business means any period which is or has been determined as the previous year for that business for the purposes of the Income-tax Act, 1922

"*Taxable profits*" means the amount by which the profits during a chargeable accounting period exceed the abatement in respect of that period

"*Abatement*" means, in respect of any chargeable accounting period, a sum which bears to a sum equal to-

(a) in the case of a company, not being a company deemed for the purposes of section 9 to be a firm, six per cent. of the capital of the company on the

first day of the said period computed in accordance with Schedule II, or one lakh of rupees, whichever is greater, or

(b) in the case of a firm having— (i) not more than two working partners, one lakh of rupees, or (ii) three working partners, one and a half lakhs of rupees, or (iii) four or more working partners, two lakhs of rupees, or

(c) in the case of a Hindu undivided family, two lakhs of rupees, or

(d) in any other, one lakh of rupees,—  
the same proportion as the said period bears to the period of one year.

*Rules for computing the capital of a company for purposes of Business profits Tax*

1 For the purposes of ascertaining the abatement under this Act in respect of any chargeable accounting period, the capital of a company shall be computed in accordance with the following rules

2. (1) Where the company is one to which clause (a) of rule 3 of schedule I applies, its capital shall be the sum of the amounts of its paid-up share capital and of its reserves in so far as they have not been allowed in computing the profits of the company for the purposes of the Indian Income-tax Act, 1922

(2) Where the company is one to which clause (b) of rule 3 of schedule I applies, its capital, ascertained in accordance with sub-rule (1) of this rule shall be diminished by the cost to it of its investments or other property, the income from which is not includible in the profits, so far as that cost exceeds any debt for money borrowed by it

(3) In all other cases, the capital shall be the sum ascertained in accordance with the said sub-rule, diminished by the cost to the company of its investments so far as that cost exceeds any debt for money borrowed by it.

(3) So much of the premium realized by a company from the issue of any of its shares as is retained in the business shall be regarded as forming part of its paid-up capital for the purposes of rule 2

Any deposits with the Central Government under

section 10 of the Indian Finance Act, 1942, or section 2 of the Excess Profits Tax Ordinance, 1943, shall not be regarded as investment or other property for the purposes of this Schedule.

*Rules for the computation of profits for purposes of Business Profits Tax.*

(1) The profits of a business during any chargeable accounting period shall be separately computed, and shall, subject to the provisions of this Schedule, be computed in accordance with the provisions of section 10 of the Indian Income-tax Act, 1922.

Provided that any sums other than any interest paid by a firm to a partner of the firm excluded under the proviso to clause (iii) of sub-section (2) or clause (a) of sub-section (4) of that section from the allowances made in computing the profits of the business for the purposes of income-tax shall, if paid, be included in those allowances when computing the profits of the business for the purposes of business profits tax:

Provided further-

(a) that any sum received or credited in a chargeable accounting period which by virtue of rule 9 of Schedule I to the Excess Profits Tax Act, 1940, have been treated as business receipts for the purpose of assessment to excess profits tax; and

(b) any expenditure or loss incurred in any chargeable accounting period, allowance in respect of which has been made for excess profits tax purposes,—

shall be disregarded in computing the profits or losses of the chargeable accounting period

Provided further that where a chargeable accounting period is not an accounting period, the profits or losses of the business during the accounting periods wholly or partly included within the chargeable accounting period shall be so computed as aforesaid, and such division and apportionment to specific periods of those profits or losses and such aggregation of those profits and losses, or any apportioned part thereof, shall be made as appears necessary to arrive at the profit during the chargeable accounting period, and any such apportionment shall be made in proportion to the number of days in the respective periods.

2. (1) The principle of adding the allowance for depreciation for any one period to the allowance for depreciation for any subsequent period and deeming it to be part of

the allowance for such subsequent period shall not be followed.

(2) Nothing in this Act shall be construed as permitting the application, in computing profits for the purposes of business profits tax, of the provisions of sub-section (2) of section 24 of the Indian Income-tax Act, 1922.

3. Income received from investments or other property shall be included in the profits only as provided in this rule, that is to say,

(a) in the case of the business of a building society, or a banking business, insurance business or business consisting wholly or mainly in the dealing in or holding of investments or other property, the profits shall include all income received from investments of other property, or

(b) in the case of a business part of which consists in banking, insurance or dealing in investments or other property, not being a business to which clause (a) applies, the profits shall include all income received from investments or other property held for the purposes of that part of that business.

Provided that —

(i) income received directly by way of dividend or distribution of profits from a body corporate carrying on business as defined in this Act, and

(ii) income to which the persons carrying on the business are not beneficially entitled,—  
shall in no case be included

4 (1) In the case of a business carried on, in any accounting period which constitutes or includes a chargeable accounting period, by a company, the directors whereof have throughout that accounting period a controlling interest therein, no deduction shall be made in respect of directors' remuneration in computing the profits for that accounting period

(2) Where, in the case of a business carried on by a company in any accounting period which constitutes or includes a chargeable accounting period, the directors of the company have during any part of that accounting period a controlling interest therein, and the case is not one to which sub-rule (1) applies, the profits of the accounting period shall be computed as if the directors of the company had no controlling interest therein, and to the part thereof appropriate to the chargeable accounting period ascertained in accordance with the third proviso to rule 1 shall be added the directors'

remuneration for that part of the chargeable accounting period during which the directors of the company had a controlling interest therein.

(3) In this rule the expression "directors' remuneration" does not include—

(a) the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and is not the beneficial owner of, or able, either directly or through the medium of other companies or by any other indirect means, to control more than five percent, of the ordinary share capital of the company, or

(b) the remuneration of any managing agent where such remuneration is included in the profits of the managing agent's business for the purposes of the business profits tax.

5 (1) In computing the profits of any chargeable accounting period no deduction shall be allowed in respect of expenses in excess of the amount which the Income-tax Officer considers reasonable and necessary, having regard to the requirements of the business, and, in the case of directors' fees or other payments for services, to the actual services rendered by the person concerned :

Provided that no disallowance under this rule shall be made by the Income-tax Officer unless he has obtained the prior authority of the Inspecting Assistant Commissioner of Income-tax

(2) Any person who is dissatisfied with the decision of the Income-tax Officer under this rule may appeal in the prescribed time and manner to the Appellate Tribunal referred to in section 17.

*Relief on occurrence deficiency of profits:* Where a deficiency of profit occurs in any chargeable period in any business, the taxable profits of the business shall be deemed to be reduced and relief shall be granted in accordance with the following provisions:-

(a) the aggregate amount of the taxable profits for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency of profits and the amount of business profits tax payable in respect thereof shall be deemed to be reduced accordingly and the relief necessary to give effect to the reduction shall be given by repayment or otherwise;

(b) Where the amount of the deficiency of profits exceeds the aggregate amount of the taxable profits for the previous chargeable accounting periods or where there is no previous chargeable accounting period, the balance of the deficiency of profits or the whole of the deficiency, as the case may be, shall be applied in reducing any taxable profits for the next subsequent chargeable accounting period, and if and so far as it exceeds the amount of those profits, any taxable profits for the next subsequent chargeable accounting period and so on.

*Deficiency of profits* means- (1) Where profits have been made in any chargeable accounting period, the amount by which such profits fall short of the abatement in respect of that period, (ii) where a loss has been made in any chargeable accounting period, the amount of the loss added to the abatement in respect of that period.

*Change in persons carrying on business* As from the date of any change in the person carrying on a business, the business shall be deemed for all purposes of this Act to have been discontinued and a new business to have been commenced.

*Provided that* where a change takes place in the persons carrying on a business and where except for such change relief would be allowable as explained above, the Central Board of Revenue may, if it thinks fit, allow such relief under that section as it considers just, having regard to the extent to which the persons directly or indirectly interested in the business before the change remain interested therein after the change.

*Allowance of business profits tax in computing income for income-tax purposes* The amount of the business profits tax payable by any person for any chargeable accounting period shall, in computing total income for the purposes of the relevant income-tax or super-tax assessment, be allowed as a deduction.

*Provided that* where, under the above provisions relating to deficiencies of profits relief is given by way of repayment from business profits tax chargeable for any chargeable accounting period previous to that in which the deficiency occurs, the amount of the deduction allowed shall not be altered, but the amount repayable shall be taken into account in computing the profits and gains of the business for the purposes of income-tax as if it were a profit of the business accruing in the previous year (as determined for that business for the purposes of the India Income-tax Act, 1922) in which the deficiency of profits occurs

The Act also makes separate provisions for '*inter connected companies*' and for '*aggregation of profits in certain cases.*'

## CHAPTER XVII

# LAW RELATING TO MOTOR VEHICLES

### **"Motor vehicle" :**

"Motor vehicle" is a general term meaning any mechanically propelled vehicle adopted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer, but does not include a vehicle running upon fixed rails or used solely upon the premises of the owner.

A motor vehicle may be one of the following classes, namely, (a) motor cycle, (b) motor car, (c) motor cab, (d) delivery van, (e) light transport vehicle, (f) heavy transport vehicle, (g) locomotive, (h) tractor, (i) road-roller, (j) invalid carriage, or (k) motor vehicle of a specified description

*"Private carrier"* means an owner of a transport vehicle other than a public carrier who uses that vehicle solely for the carriage of goods which are his property or the carriage of which is necessary for the purposes of his business not being a business of providing transport, or who uses the vehicle for any of the following purposes, namely :

(a) the delivery or collection by or on behalf of the owner of goods sold, used or let on hire or hire-purchase in the course of any trade or business carried on by him other than the trade or business of providing transport,

(b) the delivery or collection by or on behalf of the owner of goods which have been or which are



to be subjected to a process or treatment in the course of a trade or business carried on by him, or

(c) the carriage of goods in a transport vehicle by a manufacturer of or agent or dealer in such goods whilst the vehicle is being used for demonstration purposes,

*"Public carrier"* means an owner of a transport vehicle who transports or undertakes to transport goods, or any class of goods, for another person at any time and in any public place for hire or reward, whether in pursuance of the terms of a contract or agreement or otherwise, and includes any person, body, association or company engaged in the business of carrying the goods of persons associated with that person, body, association or company for the purpose of having their goods transported.

*"Public service vehicle"* means any motor vehicle used or adopted to be used for the carriage of passengers for hire or reward, and includes a motor cab, contract carriage, and stage carriage.

*"Transport vehicle"* means a public service vehicle, a goods vehicle, a locomotive or a tractor other than a locomotive or a tractor used solely for agricultural purposes.

### **Licensing of drivers of motor vehicles.**

*Necessity for driving licence :* No person shall drive a motor vehicle in any public place unless he holds an effective licence issued to himself authorising him to drive the vehicle; and no person shall so drive a motor vehicle as a paid employee or shall so drive a public service vehicle unless his licence specifically entitles him to do so.

A Provincial Government may prescribe the conditions subject to which the above provision shall not apply to a person receiving instructions in driving a motor vehicle. These are generally provided for in a *Learner's Licence*,

*Age limit in connection with driving of motor vehicles* No person under the age of eighteen years shall drive a motor vehicle in any public place. Similarly, no person under the age of twenty years shall drive a transport vehicle in any public place. District Commanders, of independent brigades, Officers Commanding units having mechanically propelled vehicles in their charge and Commanders, Royal Engineers may, however, grant licences, valid throughout British India, to persons who have completed their eighteenth year to drive motor vehicles which are the property of the Central Government in the Defence Department.

*Grant of licence:* Any person who is not disqualified as explained above for driving a motor vehicle and who is not for the time being disqualified for holding or obtaining a licence may apply to the licensing authority having jurisdiction in the area in which he ordinarily resides or carries on business, or, if the application is for a licence to drive as a paid employee, in which the employer resides or carries on business, for the issue to him of a licence.

The application shall be in form A as set forth in the First Schedule, shall be signed by, or bear the thumb impression of, the applicant in two places, and shall contain the information required by the form. Where the application is for a licence to drive as a paid employee or to drive a transport vehicle, or where in any other case the licensing authority for reasons to be stated in writing so requires, the application shall be accompanied by a medical certificate in Form C, signed by a registered medical practitioner. Every application for a licence to drive as a paid employee and every application for a licence to drive a transport vehicle shall be accompanied by three clear copies of a recent photograph of the applicant. If from the application or from the medical certificate it appears that the applicant is suffering from any disease or disability

which is likely to cause the driving by him of a motor vehicle of the class which he would be authorised by the licence applied for to drive to be a source of danger to the public or to the passengers, the licensing authority shall refuse to issue the licence.

The *diseases and disabilities* absolutely disqualifying a person for obtaining a licence to drive a motor vehicle are: (1) Epilepsy; (2) Lunacy; (3) Heart disease likely to produce sudden attacks of giddiness or fainting; (4) Inability to distinguish with each eye at a distance of 25 yards in good day light (with the aid of glasses, if worn) a series of seven letters and figures in white on a black ground of the same size and arrangement as those of the registration mark of a motor car, (5) A degree of deafness which prevents the applicant from hearing the ordinary sound signals; (6) Colour blindness; (7) and Night-blindness. Leprosy absolutely disqualifies a person for obtaining a licence to drive a public service vehicle.

No licence shall be issued to any applicant unless he passes to the satisfaction of the licensing authority the *test of competence* to drive specified in the Third Schedule to the Act. This test shall be carried out in a vehicle of the type to which the application refers. (a) A person who passes the test in driving a motor car or a motor cab or a delivery van shall be deemed to have passed the test for all of these vehicles (b) A person who passes the test in driving a light transport vehicle shall be deemed also to have passed the test in driving the vehicles referred to in clause (a), and (c) a person who passes the test in driving a heavy transport vehicle shall be deemed also to have passed the test in driving any motor vehicle other than a motor cycle.

*Fee for a licence* for driving is Rs. 5/- and for renewal Rs. 3/- if the application for renewal is made previous to, or not more than fifteen days subsequent to, the date on which the licence is due to expire and

shall be five rupees in any other case, unless the licencing authority is satisfied that the holder was prevented by good cause from applying for the renewal of the licence within fifteen days after its expiry

A licencing authority may issue a licence to drive a motor cycle or a motor car notwithstanding that it is not the appropriate licensing authority, if the licensing authority is satisfied, that there is good reason for the applicant's inability to apply to the appropriate licensing authority

### **Extent of validity of licence.**

Subject to any rules made by a Provincial Government, a licence issued in the manner explained above, is effective throughout British India There is a reciprocal arrangement with the Indian States by which such a licence is effective in any Indian State also The law lays down that if the Central Government is satisfied that licences issued in British India under the Act are not effective in any Indian State or French or Portuguese Settlement bounded by India or are effective subject to unreasonable conditions or that like conditions and requirements to those imposed by the Act are not imposed in a reasonable degree upon the issue of licences in any State or Settlement as aforesaid, the Central Government shall, by notification in the official Gazette, declare that licences generally or any particular class of licence issued in any such State or Settlement shall not be valid in British India

Similarly, subject to any rules made by the Central Government in this respect, a licence to drive a motor vehicle issued by a competent authority in any Indian State or in the French or Portuguese Settlements bounded by India shall, if the holder is ordinarily resident in the State or Settlement in which the licence was issued, be valid throughout British India as if it were a licence issued under this Act

### **Currency of licences**

A licence issued in the foregoing manner shall,

subject to its cancellation or disqualification of the holder, be effective without renewal for a period of twelve months only from the date of issue or last renewal

Application for the renewal of the licence shall be made in Form B as set forth in the First Schedule.

### **Registration of motor vehicles.**

No person is permitted to drive any motor vehicle and no owner of a motor vehicle shall cause or permit the vehicle to be driven in any public place or in any other place for the purpose of carrying passengers or goods unless the vehicle is registered and the certificate of registration of the vehicle has not been suspended or cancelled and the vehicle carries a registration mark displayed in the prescribed manner

This, however, does not apply to a motor vehicle while being driven within the limits of jurisdiction of one registering authority to or from appropriate place of registration for the purpose of being registered or to a motor vehicle exempted from the provisions regarding registration while in the possession of a dealer in motor vehicles

Every owner of a motor vehicle shall cause the vehicle to be registered by a registering authority in the province in which he has the residence or place of business where the vehicle is normally kept. The Master General of the Ordnance in India may register any motor vehicle being the property of the Central Government in the Defence Department.

*Registration how to be made:* An application by or on behalf of the owner of a motor vehicle for registration shall be in form E as set forth in the First Schedule, shall contain the information required by that form, and shall be accompanied by the prescribed fee. The registering authority shall issue to the owner of a motor vehicle registered by it a certificate of regis-

tration in form G as set forth in the First Schedule and shall enter in a record to be kept by it particulars of such certificate. The registering authority shall assign to the vehicle, for display thereon in the prescribed manner, a distinguishing mark consisting of one of the groups of letters allotted to the province by the Sixth Schedule followed by a number containing not more than four figures.

*Temporary registration.* The owner of a motor vehicle may apply to any registering authority to have the vehicle temporarily registered in the prescribed manner and for the issue in the prescribed manner of a temporary certificate of registration and a temporary registration mark. Such registration shall be valid only for a period not exceeding one month, and shall not be renewable.

*Assignment of fresh registration mark on removal to another province.* When a motor vehicle registered in one province has been kept in another province for a period exceeding twelve months, the owner of the vehicle shall apply to the registering authority, within whose jurisdiction the vehicle then is, for the assignment of a new registration mark and shall present the certificate of registration to that registering authority. The registering authority to which such application is made shall assign the vehicle a registration mark in accordance with the Sixth Schedule to be carried thenceforth on the vehicle and shall enter the mark upon the certificate of registration before returning it to the applicant and shall, in communication with the registering authority by whom the vehicle was previously registered, arrange for the transfer of the registration of the vehicle from the records of that registering authority to its own records.

*Change of residence or place of business.* If the owner of a motor vehicle ceases to reside or have his place of business at the address recorded in the certificate of registration of the vehicle, he shall, within

thirtydays of any such change of address intimate his new address to the registering authority by which the certificate of registration was issued, or, if the new address is within the jurisdiction of another registering authority, to that other registering authority, and shall at the same time forward the certificate of registration to the registering authority in order that the new address may be entered therein. A registering authority other than the original registering authority making any entry shall communicate the altered address to the registering authority.

The above provision does not apply where the change of the address recorded in the certificate of registration is due to a *temporary absence* not intended to exceed six months in duration or where the motor vehicle is neither used nor removed from the address recorded in the certificate of registration.

*Transfer of ownership* : Within thirty days of the transfer of ownersihp of any motor vehicle registered as aforesaid, the transferee shall report the transfer to the registering authority within whose jurisdiction he resides and shall forward the certificate of registration to that registering authority together with the prescribed fee in order that particulars of the transfer of ownership may be entered therein. A registering authority other than original registering authority making any such entry shall communicate the transfer of ownership to the original registering authority.

### Limits of speed.

No person is permitted to drive a motor vehicle or cause or allow a motor vehicle to be driven in any public place at a speed exceeding the maximum speed fixedfor the vehicle by or under this Act or by any law for the time being in force.

Such maximum speed in no case shall exceed the maximum fixed as follows :—

Class of Vehicle	Maximum speed per hour miles.	
1 Passenger vehicles, that is to say, vehicles constructed solely for the carriage of passengers and their effects —		
(a) if all the wheels are fitted with pneumatic tyres and the vehicle is not drawing a trailer —		
(i) If the vehicle is a motor cycle, motor car or motor cab . .	No limit.	
(ii) if the vehicle is a public service vehicle other than a motor cab ...	...	30
(b) if the vehicle, being a motor car or motor cab, is drawing two-wheeled trailer of a laden weight not exceeding 1,700 pounds avoirdupois, and if all the wheels of the vehicle and trailer are fitted with pneumatic tyres	.	30
(c) any other vehicle, including an invalid carriage .	...	20
2 Goods vehicles, that is to say vehicles constructed or adapted for use or used for the conveyance of goods —		
(a) if all the wheels are fitted with pneumatic tyres and the vehicle is a light transport vehicle and is not drawing a trailer		
(b) in any other case ...	...	15
3. Tractors —		
(a) if drawing not more than one trailer and all the wheels of the tractor and trailer are fitted with pneumatic tyres ...	...	15
(b) in any other case .	.	6
4. Locomotives, whether drawing a trailer or not .. .	...	6



The Provincial Government or any authority authorised in this behalf by the Provincial Government may, if satisfied that it is necessary to restrict the speed of motor vehicles in the interests of public safety or convenience or because of the nature of any road or bridge, by notification in the official Gazette, fix such maximum speed limit, as it thinks fit for motor vehicles or any specified class of motor vehicles or for motor vehicles to which a trailer is attached, either generally or in a particular area or on a particular road or roads.

### **Driving regulations**

1. The driver of a motor vehicle shall drive the vehicle as close to the left hand side of the road as may be expedient, and shall allow all traffic which is proceeding in the opposite direction to pass him on his right hand side.

2. Except as provided in regulation 3, the driver of a motor vehicle shall pass to the right of all traffic proceeding in the same direction as himself

3. The driver of a motor vehicle may pass to the left of a vehicle the driver of which having indicated an intention to turn to the right has drawn to the road and may pass a tram-car or other vehicle running on fixed rails, whether travelling in the same direction as himself or otherwise, on either side :

Provided that in no case shall he pass a tram-car at a time or in a manner likely to cause danger or inconvenience to other users of the road or pass on the left hand side a tram-car, which when in motion would be travelling in the same direction as himself, while the tram-car is at rest for the purpose of setting down or taking up passengers

4. The driver of a motor vehicle shall not pass a vehicle travelling in the same direction as himself

(a) if his passing is likely to cause inconveni-

ence or danger to other traffic proceeding in any direction, or

(b) where a point or corner or a hill or an obstruction of any kind renders the road ahead not clearly visible.

5 The driver of a motor vehicle shall not when being overtaken or being passed by another vehicle, increase speed or do anything in any way to prevent the other vehicle from passing him.

6 The driver of a motor vehicle shall slow down when approaching a road, intersection, a road junction or a road corner, and shall not enter any such intersection or junction until he has become aware that he may do so without endangering the safety of persons thereon.

7. The driver of a motor vehicle shall on entering a road intersection, if the road entered is a main road designated as such, give way to the vehicles proceeding along that road, and in any other case give way to all traffic approaching the intersection on his right hand.

8 The driver of a motor vehicle shall, when passing or meeting a procession or a body of troops or police on the march or when passing workmen engaged on road repair, drive at a speed not greater than fifteen miles an hour.

9. The driver of a motor vehicle shall -

(a) when turning to the left, drive as close as may be to the left hand side of the road from which he is making the turn and of the road which he is entering,

(b) when turning to the right, draw as near as may be to the centre of the road along which he is travelling and cause the vehicle to move in such a manner that -

(i) as far may as be practicable it passes beyond,

and so as to leave on the driver's right hand, a point formed by the intersection of the centre lines of the intersecting roads. and

(11) it arrives as near as may be at the left hand side of the road which the driver is entering.

A Provincial Government or any authority authorised in this behalf by the Provincial Government may, by notification in the official Gazette or by the erection at suitable places of the appropriate traffic sign designate certain roads as main roads for the purposes of the above regulations.

### Signals and signalling devices

(1) When about to turn to the right or drive to the right hand side of the road in order to pass another vehicle or for any other purpose, a driver shall extend his right arm in a horizontal position outside of and to the right of his vehicle with the palm of the hand turned to the front.

(2) When about to turn to the left or to drive to the left hand side of the road, a driver shall extend his right arm and rotate it in anti-clockwise direction.

(3) When about to slow down, a driver shall extend his right arm with the palm downward and to the right of the vehicle and shall move the arm so extended up and down several times in such a manner that the signal can be seen by the driver of any vehicle which may be behind him.

(4) When about to stop, a driver shall raise his right forearm vertically outside of and to the right of the vehicle, palm to the front.

(5) When a driver wishes to indicate to the driver of a vehicle behind him that he desires that driver to overtake him, he shall extend his right arm horizontally outside of and to the right of the vehicle and shall swing the arm backwards and forwards in a semi-circular motion.

The signal of an intention to turn to the right or the left or to stop may also be given by a mechanical or an electrical device of a prescribed nature affixed to the vehicle

### **Vehicles with left hand control.**

No person shall drive or cause or allow to be driven in any public place any motor vehicle with a left hand steering control unless it is equipped with a mechanical or electrical signalling device of a prescribed nature and in working order

### **Pillion riding.**

No driver of a two wheeled motor cycle shall carry more than one person in addition to himself on the cycle and no such person shall be carried otherwise than sitting on a proper seat securely fixed to the cycle behind the driver's seat.

### **Duty to produce licence and certificate of registration.**

The driver of a motor vehicle in any public place shall, on demand by a police officer in uniform, produce his licence for examination

The owner of a motor vehicle, or in his absence the driver or other person in charge of the vehicle, shall, on demand by a registering authority or any person authorised in this behalf by the Provincial Government, produce the certificate of registration of the vehicle and, where the vehicle is a transport vehicle, the certificate of fitness

If the licence or certificates, as the case may be, are not at the time in the possession of the person to whom demand is made, it shall be a sufficient compliance with the provision of law if such person produces the licence or certificates within ten days at any police station in British India which he specifies to the police officer or authority making the demand.

*Provided that*, except to such extent and with such modifications as may be prescribed this shall not apply to a driver driving as a paid employee, or to the driver of a transport vehicle or to any person required to produce the certificate of registration or the certificate of fitness of a transport vehicle.

### Duty of driver to stop in certain cases

(1) The driver of a motor vehicle shall cause the vehicle to stop and remain stationery so long as may reasonably be necessary—

(a) when required to do so by any police officer in uniform, or

(b) when required to do so by any person in charge of an animal if such person apprehends that the animal is, or being alarmed by the vehicle will become, unmanageable, or

(c) when the vehicle is involved in the occurrence of an accident to a person, animal or vehicle or of damage to any property, whether the driving or management of the vehicle was not the cause of the accident or damage,

and he shall give his name and address and the name and address of the owner of the vehicle to any person affected by any such accident or demands it provided such person also furnishes his name and address

(2) The driver of a motor vehicle shall, on demand by a person giving his own name and address and alleging that the driver has committed an offence of driving recklessly or dangerously, give his name and address to that person

For the above provision, the expression "animal" means any horse, cattle, elephant, camel, ass, mule, sheep or goat.

### **Duty of driver in case of accident and injury to a person**

When any person is injured of an accident in which a motor vehicle is involved, the driver of the vehicle or other person incharge of the vehicle 'shall—

(a) take all reasonable steps to secure medical attention for the injured person, and, if necessary, convey him to the nearest hospital, unless the injured person or his guardian, in case he is a minor, desires otherwise,

(b) give on demand by a police officer any information required by him or, if no police officer is present, report the circumstances of the occurrence at the nearest police station as soon as possible, and in any case within twenty-four hours of the occurrence

### **Power of arrest without warrant**

(1) A police officer in uniform may arrest without warrant any person who commits in his view an offence of (i) driving recklessly or dangerously, or (ii) driving while under the influence of drink or drugs, (iii) taking vehicle without authority *provided that* any person so arrested in connection with an offence under (ii) above shall be subjected to medical examination by a registered medical practitioner within two hours of his arrest or shall then be released from custody.

(2) A police officer in uniform may arrest without warrant (a) any person who being required under the provisions of the Act to give his name and address refuses to do so, or gives a name or address which the police officer has reason to believe to be false, or (b) any person concerned in an offence under the Act or reasonably suspected to have been so concerned, if the police officer has reason to believe that he will abscond or otherwise avoid the service of a summons

(3) A police officer arresting without warrant

the driver of a motor vehicle shall, if the circumstances so require, take or cause to be taken any steps he may consider proper for the temporary disposal of the vehicle.

### **Power of police officer to impound document.**

(1) Any police officer authorised in this behalf or other person authorised in this behalf by the Provincial Government may, if he has reason to believe that any identification mark carried on a motor vehicle or any licence, permit, certificate of registration, certificate of insurance or other document produced to him by the driver or person in charge of a motor vehicle is a false document within the meaning of section 464 of the Indian Penal Code, seize the mark or document and call upon the driver or owner of the vehicle to account for his possession of or the presence in the vehicle of such mark or document.

(2) Any police officer authorised in this behalf by the Provincial Government may, if he has reason to believe that the driver of a motor vehicle who is charged with any offence under the Act may abscond or otherwise avoid the service of a summons, seize any licence held by such driver and forward it to the court taking cognizance of the offence

(3) A police officer seizing a licence under the above provision shall give to the person surrendering the licence a temporary acknowledgment therefor and such acknowledgment shall authorise the holder to drive until the licence has been returned to him or the court has otherwise ordered.

### **Restriction on conviction.**

Whoever contravenes any provision of the Act or of any rule made thereunder is punishable with fine and in certain cases with imprisonment also. No person prosecuted for an offence of driving at excessive speed or driving recklessly or dangerously, shall be convicted unless (a) he was warned at the time the offence





## CHAPTER XVIII

### LAW RELATING TO ARMS

#### Arms.

The law relating to arms in India is laid down by the Indian Arms Act, 1878. According to that Act "arms" includes firearms, bayonets, swords, daggers, spears, spearheads and bows or arrows, also cannon, and parts of arms, and machinery for manufacturing arms. The definition thus is not exhaustive. The purpose for which an implement is *primarily* intended regulates whether it would in ordinary parlance be spoken of as an arm. Where the circumstances of the case show that a weapon or instrument is carried for the purpose of offence or defence and not as an article for the domestic or agriculture utility there is no reason why such weapon or instrument should not be held to fall within the category of arms. On the other hand, the mere fact that a weapon is dangerous and if used may probably cause death will not make it an "arm" within the meaning of the Act.

A fire arm even though unserviceable but which can be repaired is a firearm. But it has been held that the unserviceable remains of a gun cannot be fairly described as a fire-arm. Similarly, a pistol which is out of repair cannot be regarded as a weapon for offence or defence and therefore it does not fall within the category of arms.

*Airguns and air pistols:* An *airgun* has been classed by Government as a toy for purposes of tariff and does not fall under the definition of arms. The following patterns of airguns were, by orders of the Government declared to be toys;-(i) The Quacken-bush

not adapted for use with explosive substances, (ii) The Gem (2 kinds) (iii) The Britannia (iv) The Jewel (v) The Militia (vi) The Birmingham small arms (ladies models) These cheap spring guns cannot be regarded as deadly weapons in the ordinary sense The same test should be applied in deciding whether any pattern of airgun should or should not be considered as coming within the purview of the Arms Act and the rules thereunder

*Airguns and air-pistols* are excluded from the operation of the Act subject to the discretion of the Provincial Government The Government of the Punjab has however retained the restriction in respect of the air pistols Similarly the Government of Burma has retained the restriction in respect of Dianna air pistols

Airguns and air-pistols which satisfy the following test have been excluded from the operation of prohibitions and directions contained in the Act unless the Central Government retains any such prohibition, namely, that the projectile discharged from such guns or pistols do not perforate a target 12 inches square formed by five straw boards of foolscap size, each board being  $\frac{3}{64}$ ths of an inch thick and closely held together in a frame But other kinds of air guns and air pistols fall within the province of the Act

*Bows and arrows* Bows and arrows are exempt in the Punjab and Delhi province

*Clasp knife:* A clasp knife does not fall under the category of arms But a clasp knife which has a blade  $5\frac{1}{2}$ " long with a pointed end and is fitted to a long handle and turns over into the handle has been held to be an arm,

*Chhavi Head A chhavi* is an arm under the Act Possession of *chhavi* in the Punjab except in Lahaul and Spitty and except in Simla and Kangra districts is an offence under the Arms Act.

*Kirpan*. The exemption under the Arms Act is only applied to Kirpan possessed or carried by Sikhs and not to the manufacture of Kirpans by Sikhs.

*Kukris*. Kukris possessed or carried by pensioned Gurkha Officers, non-commissioned officers or soldiers of His Majesty's Forces resident in British India, are exempt

*Nishan Sahib*. It has been held that a spear which has the appearance of spear and which can be used as a spear does not cease to be so because it is electroplated or it is called something else such as *nishan sahib* or because of the religious uses to which it is put

*Riot pistols*. Appliances such as hand grenades and riot pistols for discharging gas which are designed to render helpless for the time being a mob or an individual without causing a permanent injury, are arms within the meaning of the Act and are subject to all the prohibitions and restrictions imposed by the Act and Rules

*"Sword stick"* A sword stick is an arm. In the Punjab swords are exempted but not the sword sticks

*Toy Cannon*. A toy cannon weighing less than 56 lbs and having a calibre of less than an inch, a length of bore of less than 24 inches, and the interior of bore unrifled, is exempt from the Arms Act.

### **Restriction on manufacture, conversion or sale of arms.**

No person is permitted to manufacture, convert or sell, or keep, offer or expose for sale, any arms, ammunition or military stores except under a licence and in the manner and to the extent permitted thereby. But a person is permitted to sell any arms or ammunition *which he lawfully possesses for his own private use* to any person who is not by any enactment for the time being in force prohibited from possessing the same, but every person so selling arm or ammunition

to any person other than a person entitled to possess the same by reason of exemption (see below) must, without unnecessary delay, give to the Magistrate of the district, or to the officer in-charge of the nearest police-station, notice of the sale and of the purchaser's name and address

All officers of Government whose duty it may be to conduct sale of arms should satisfy themselves before the confirmation of the sale by a reference to the District Magistrate that the purchasers are entitled to possess such arms, and auctioneers should be warned against selling arms and ammunition to persons not legally entitled to possess them.

If an *officer or soldier* wishes to dispose off any arm or ammunition by private sale or by public auction he should ascertain that the would-be purchaser is a person entitled by law to possess the same and if such person's name does not appear in the official Army or Civil List he should apply to the Magistrate or Deputy Commissioner of the district, or the local officer, as the case may be, for permission for the transaction to take place

### **Import, export and transport of arms.**

No person can bring or take by sea or by land into or out of British India any arms, ammunition or military stores except under a licence and in the manner and to the extent permitted by such licence. This, however, does not apply to arms other than cannon or ammunition imported or exported in reasonable quantities for his own private use by any person lawfully entitled to possess the same, but the Collector of customs or any other officer empowered by the Central Government in this behalf by name or in virtue of his office may at any time detain such arms or ammunition until he receives the orders of the Central Government thereon. It is to be observed that arms, ammunition and military stores taken from one part

to another by sea or across intervening territory not being part of British India are taken out of land brought into British India.

*Officers empowered to detain arms and ammunition:* The following officers are empowered to detain arms and ammunition under the above provisions:

*Assam*—All Magistrates and all police officers not below the rank of inspectors.

*Bengal*—All Magistrates and police officers not below the grade of sub-inspector.

*Bombay*—Political resident at Aden.

*Central Provinces*—All Magistrates and all officers of the police not below the rank of Assistant District Superintendent of police.

*N. W F Provinces*—All Magistrates and all police officers not below the rank of officer in-charge of a station.

*Punjab*—All Magistrates and police officers, not below the rank of officer incharge of a station.

*United Provinces*—Any Magistrate, Justice of the Peace, Superintendent, Assistant or Deputy Superintendent of police and any police officer being not lower in rank than an officer in charge of a police station.

*Prohibition under Sea Customs Act.* The Central Government has prohibited:-

(a) the bringing by sea or by land into British India through the medium of the post office, of arms, ammunition or military stores.

*Provided* that this prohibition shall not apply to bringing of arms, ammunition, or military stores into British India- (i) from Berar, or (ii) by or on behalf of Government

(b) the bringing or taking by sea, or land into, or British India of arms, ammunition, or military stores out of in accordance with the provisions

of the Arms Act and of the rules and orders for the time being in force thereunder

### **Restrictions on Railway Authorities for transport of arms**

Railway authorities are not to receive for dispatch to any state any case or package containing arms, ammunition or military stores unless accompanied by original licence and must satisfy themselves (i) that the arms, ammunition and stores correspond with the description given in such licence and (ii) that such licence is identical with the copy sent to them. If these conditions are not fulfilled and the licence is not identical with the copy sent to them, the Railway authorities must not receive the consignment for despatch and must forthwith inform the political officer granting the licence

### **Prohibition of going armed without licence.**

No person can go armed with any arms except under a licence and to the extent and in the manner permitted thereby. Any person so going armed without a licence or in contravention of any of its provisions may be disarmed by any Magistrate, Police Officer or other person empowered by the Central Government in this behalf by name or by virtue of his office

*Failure to produce licence* Law does not require that a licence to carry arm shall always be on the person of the bearer of the arms. If on being required to show his licence, the person carrying the arm is prepared to produce it on being given reasonable opportunity to get it and such licence exists, he cannot be prosecuted

*Temporary possession by servant* It generally happens that a sportsman on his way to and from the field hands over his gun to his servant to avoid unnecessary fatigue to himself. By doing so the servant should not be considered as going armed, when he has no control over the use of the gun. He is simply bearer of the gun as a load. If the gun were taken to

pieces before being handed over to the servant it would be difficult to hold that he was going armed with it, and the moral restriction of servant's duty to make no use of the gun seems in effect to make the same difficulty when the gun is left complete.

*Going armed on a journey.* A licence for going armed on a journey in or through any Province may be granted in Form XX—(a) in a Presidency town by the Commissioner of Police, (b) in any other place by the District Magistrate or by any Subdivisional Magistrate especially empowered by the Provincial Government in that behalf; or in the case of a person residing in a State in India by the Political officer for such State.

### **Unlicensed possession of fire-arms.**

No person can have in his possession or under his control any cannon or fire-arms, or any ammunition or military stores, except under a licence and in the manner and to the extent permitted thereby.

*Temporary possession by son, friend etc.* The licence for holding a fire-arm is a personal privilege, and the licensee is not entitled to use the gun as he may lawfully use any other article of his. The owner of car may lend it to a friend, but he cannot lend his gun to him. In the former case the possession of the friend would be the possession of the owner, but the possession of the friend, in the case of the gun, may not necessarily be the possession of the licensee-holder.

*Joint Hindu family.* In the case of joint Hindu family where unlicensed arms are found at a place belonging to the family but not in use or occupation of a particular individual of the family, the possession or control must be deemed to be with the manager or the karta of the family. No other member can be said to have been in possession or control of the same.

Where a weapon is found in a house belonging

to a joint family, in the absence of proof that the room in which weapon kept was in the exclusive particular possession of any member of the family, it cannot be inferred that the weapon was in possession of any other person than the head of the family.

### **Exemption.**

The Central Government may, from time to time, by notification published in the official Gazette exempt any person by name or in virtue of his office, or any class of persons, or exclude any description of arms or ammunition, or withdraw any part of British India from the operation of any prohibition or direction contained in the Act, and may likewise cancel such notification.

### **Application for a licence**

Every person who wishes to obtain a licence shall apply in writing, through the medium of the post office or otherwise at his option, to the nearest authority empowered to grant such licence, and shall in such application furnish all such particulars as may be necessary to enable such licence to be granted. A form of application may be obtained from the office of the District Magistrate of the district

Every licence is granted or renewed in the appropriate form, and, save as therein otherwise expressly provided, the arms, ammunition or military stores specified and the person named in the licence shall alone be covered thereby

Every licence shall, unless previously cancelled, be in force for such period and expire on such days as, subject to any restrictions or limitations provided in the appropriate form, the authority granting it may enter thereon: *provided that* where a licence is granted in Forms XV, XVI, XVIII, or XIX for the possession of arms to be acquired by the licensee subsequently to the grant of the licence, the authority granting the licence shall at the time of granting the same direct that





## CHAPTER XIX

# CRIME AND CRIMINAL PROCEDURE

### Crime

A crime is an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment. The distinction of public wrongs from private, that is to say, of crimes from civil injuries principally consists in this, that private wrongs (or civil injuries) are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals, while public wrong (or crimes) are a violation of the public rights, due to the whole community, considered as a community in its social aggregate capacity.

### Punishments

Punishments are the evils or inconveniences imposed by law on conviction for criminal offences. In a political society, the right of punishing crimes is vested in the State. Thereby men are prevented from being judges in their own causes, and whatever power individuals once had of punishing offences against the Law of Nature is now vested in the State alone, which bears the sword of justice by the consent of the whole community. And for offences which are only *mala prohibita* and not *mala in se*, the legislature has also prescribed coercive punishments. But, in general, only those acts or defaults are made criminal, and subject the person committing them to punishment, which are manifestly contrary to the best interests of the public and the State, and are, as such, reprobated by the community at large.

### **Persons capable of committing crimes.**

The general rule is that no person shall be excused from punishment for disobedience to the criminal law, excepting such as are, by the law itself, expressly exempted from punishment. All the various pleas and excuses, which the law regards as sufficient to protect the offender, may usually be reduced to this single consideration—a want or defect of will. A purely involuntary act, as it has no merit, so neither has it any guilt, the concurrence of the will being the one thing which renders human actions either praiseworthy or blameable.

The Indian Penal Code recognises amongst others the following exceptions:

(1) Nothing is an offence which is done by a child under seven years of age.

(2) Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

(3) Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. —

(4) Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law, provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

(5) No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

(6) Nothing is an offence by reason, that it causes or that it is intended to cause, or that it is known to be likely to cause, any harm if that harm is so slight that no person of ordinary sense and temper would complain of such harm

(7) *Right of private defence*: Nothing is an offence which is done in the exercise of the right of private defence. Every person has a right, subject to certain restrictions, to defend—*firstly*, his own body, and the body of any other person, against any offence affecting the human body, *secondly*, the property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass

When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence

There is *no right of private defence* against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not strictly be justifiable by law

There is *no right of private defence* against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office though that direction may not be strictly justifiable by law

There is *no right of private defence* in cases in

which there is time to have recourse to the protection of the public authorities.

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence

*Extent of private defence :* The right of private defence of the *body* extends, under the restrictions mentioned above, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the following descriptions,

Namely :—*First*, such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault, *secondly*, such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault; *thirdly*, an assault with the intention of committing rape, *fourthly*, an assault with the intention of gratifying unnatural lust; *fifthly*, an assault with the intention of kidnapping or abducting, *sixthly*, an assault with the intention of wrongfully confining a person under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

If the offence be not of any of the descriptions enumerated above, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned above, to the voluntary causing to the assailant of any harm other than death.

The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed, and it continues so long as such apprehension of danger to the body continues.

The right of private defence of *property* extends,

under the restrictions mentioned above, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the following descriptions, namely -*First*, robbery, *secondly*, house-breaking by night, *thirdly*, mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property, *fourthly*, theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised

If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated above, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions explained above, to the voluntary causing to the wrong-doer of any harm other than death

The right of private defence of property commences when a reasonable apprehension of danger to the property commences. Against *theft* it continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered. Against *robbery* it continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues. Against *criminal trespass* or *mischief* it continues as long as the offender continues in the commission of criminal trespass or mischief. Against *house-breaking by night* it continues as long as the house-trespass which has been begun by such house-breaking continues.

If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk. A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire, without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children.

(8) Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

(9) Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

(10) Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it

(11) Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

(12) Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property. A, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving

human life or property Here if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence

### Habeas Corpus

A well-known rule of the English Common Law is that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land" Its observance is secured in two ways, by redress for unlawful arrest or imprisonment by means of a prosecution or action, and by deliverance from unlawful imprisonment by means of the writ of *habeas corpus* The writ is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege High Courts in India have no power to issue the common law prerogative writ of *habeas corpus* in matters contemplated by section 491 of the Criminal Procedure Code. The operation of this section was at first limited to the presidency-towns now the powers are extended over territories subject to the appellate criminal jurisdiction of the High Court They can be exercised, in the case of a British European subject, beyond the appellate jurisdiction and over territories appointed by the Central Government Those powers are:-

(a) that a person may be brought up before the court and dealt with according to law ,

(b) that a person detained in custody be set at liberty,

(c) that a prisoner detained in jail be brought up before the Court and examined as a witness,

(d) that a prisoner detained in jail be brought up before a court-martial or commissioners,



(e) that a prisoner be changed from one custody to another for trial;

(f) that a defendant be brought in on Sheriff's return of *cepi corpus* to a writ of attachment.

The High Court may, from time to time frame rules to regulate the procedure in cases under this section.

### **Power of search.**

Search may be under a search warrant or even without a warrant in certain cases. A *search warrant* may be issued (1) where the court has reason to believe that the person summoned to produce a document will not produce it; (2) Where the document or thing is not known to be in the possession of any person; where a general inspection or search is necessary. Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified

(2) If any District Magistrate, Sub-divisional Magistrate, Presidency Magistrate or Magistrate of the first class, upon information after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property, forged documents counterfeit stamps or coin etc., or has reason to believe that any place is used for the deposit, sale, manufacture or production of any obscene object or that any such obscene objects are kept or deposited in any place, he may by his warrant authorise any police-officer *above the rank of a constable*— (a) to enter, with such assistance as may be required, such place, and (b) to search the same in manner specified in the warrant, and (c) to take possession of any property, documents, seals, stamps or coins therein found which he reasonably suspects to be stolen, unlawfully obtained, forged, false or counterfeit, and also of any such instruments and materials or of any obscene objects, and (d) to

convey such property etc before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in some place of safety, and (e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or manufacture or keeping of any property etc.

(3) Where any newspaper or book or any document, wherever printed, appears to the Provincial Government to contain any seditious matter or any matter which promotes or is intended to promote feelings of enmity or hatred between different classes of His Majesty's subjects or which is deliberately and maliciously intended to outrage the religious feelings of any such class by insulting the religion or the religious beliefs of that class, the Provincial Government may, by notification in the official Gazette, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to His Majesty, and thereupon any police-officer may seize the same wherever found in British India and any Magistrate may by warrant authorize any police-officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

(4) Any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture has been made may *within two months* from the date of such order, apply to the High Court to set aside such order on the ground that the issue of the newspaper, or the book or other document, in respect of which the order was made did not contain any seditious or other matter of such a nature as is referred to above. Every such application must be heard and determined by a special Bench of the High Court composed of three Judges

(5) *Discovery of persons wrongfully confined :*

If any Presidency Magistrate, Magistrate of the first class or Sub-divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

(6) *General provisions relating to searches :*

Whenever any place liable to search or inspection is closed, any person residing in, or being in charge of such place shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein. If ingress into such place cannot be obtained, the officer or other person executing the warrant may break open any outer or inner door or window of any house or place, for this purpose. Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched. If such person is a woman, the search shall be made by another woman, with strict regard to decency.

(7) Before making a search the officer or other

person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situated to attend and witness the search and may issue an order in writing to them or any of them so to do. The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search shall be required to

attend the court as a witness of the search unless specially summoned by it,

(8) The *occupant* of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared as above, signed by the said witnesses, shall be delivered to such occupant or person at his request.

(9) When any person is searched as mentioned above, a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request.

(10) Any person who, without reasonable cause, refuses or neglects to attend and witness a search when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence punishable with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

(11) *Magistrate may direct search in his presence* Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant

## (12) Search without warrant

Whenever an officer in charge of a police-station or a police-officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorized to investigate may be found in any place within the limits of the police-station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or

cause search to be made, for such thing in any place within the limits of such station. Such a police-officer shall, if practicable, conduct the search in person. If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may after recording in writing his reasons for so doing require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing specifying the place to be searched and, so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place. The search shall be conducted in the same manner as search under a search-warrant, and copies of any record made as explained above shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the Magistrate on payment unless the Magistrate for some special reasons thinks fit to furnish it free of cost.

(13) An officer in charge of a police-station or a police-officer not being below the rank of sub-inspector making an investigation may require an officer in charge of another police-station, whether in the same or a different district, to cause a search to be made in any place, in any case in which the former officer might cause such search to be made, within the limits of his own station. Whenever there is reason to believe that the delay occasioned by requiring an officer in charge of another police station to cause a search to be made might result in evidence of an offence being concealed or destroyed, it shall be lawful for an officer in charge of a police-station or a police-officer making an investigation to search, or cause to be searched, any place in the limits or another police-station as if such place were within the limits of his own station. An officer thus conducting a search shall forthwith send notice of the search to the

officer in charge of the police-station within the limits of which such place is situate, and shall also send with such notice a copy of the list (if any) prepared and shall also send to the nearest Magistrate empowered to take cognizance of the offence, copies of the record referred to above. In this case also the owner or occupier of the place is entitled, on application, to be furnished with a copy of any record sent to the Magistrate on payment or free of cost if the Magistrate for some special reason thinks fit

### **Report to the police.**

Offences are classified into two classes—"cognizable" and "non-cognizable" A "*cognizable offence*" means an offence for which a police-officer, within or without the presidency-towns, may, in accordance with the second schedule of the Criminal Procedure Code or under any law for the time being in force, arrest without warrant A "*non-cognizable offence*" means an offence for which a police-officer, within or without a presidency-town, may not arrest without warrant

*Information in cognizable cases.* Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police-station shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Provincial Government may prescribe in this behalf.

*Information in non-cognizable cases* When information is given to an officer in charge of a police-station of the commission within the limits of such station of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information and refer the informant to the Magistrate

No police-officer shall investigate a non-cogni-

zable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate.

*Police-officer's power to require attendance of witnesses.* Any police-officer making an investigation may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise appears to be acquainted with the circumstances of the case, and such person shall attend as so required. A person who fails to comply with the order of the police may be prosecuted for disobedience under section 174 of the Indian Penal Code.

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